91-1653

No. _____

Supreme Court, U.S.
FILED
APR 14 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN, and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REINHARDT AND ANDERSON
MARK REINHARDT, #90530
SUSAN FORD BEDOR, #154702
E-1400 First National Bank Building
332 Minnesota Street
Saint Paul, Minnesota 55101
(612) 227-9990

COCHRANE AND BRESNAHAN
JOHN COCHRANE, #09645
24 East Fourth Street
Saint Paul, Minnesota 55101-102
(612) 298-1950

Attorneys for Petitioners

1992-EXECUTEAM / LAW DIV., 2595 N. Hamline Ave., St. Paul, MN 55113 • 612/633-1443 • 800/747-8793

QUESTION PRESENTED

1. Whether the filed rate doctrine is an exception to the enforcement of RICO, 18 U.S.C. § 1961 et. seq.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the Eighth Circuit (Supreme Court Rule 21.1(b)).

TABLE OF CONTENTS

Question Presented i

Table of Authorities iv

Opinions Below 2

Jurisdiction 3

Provisions of Statute Involved 3

Statement of the Case 6

A. Proceedings and Disposition Below 6

B. Factual Allegations 8

Reasons for Granting the Writ 12

I. This Court Should Grant Certiorari to Resolve a Conflict Among the Circuits 13

II. The Eighth Circuit's Opinion is Irreconcilable with the Previous Decision of this Court 21

Conclusion 23

APPENDIX:

Appendix A:
Entry of Judgment, February 18, 1992 ..... 1A

Appendix B:
Eighth Circuit Opinion, January 15, 1992 ..... 3A

Appendix C:
District Court Memorandum and Order,
April 4, 1990 ..... 27A

Appendix D:
Order of Remand, October 30, 1989 ..... 48A

Appendix E:
United States Supreme Court Opinion,
June 26, 1989 ..... 51A

Appendix F:
Entry of Judgment, November 12, 1987 ..... 84A

Appendix G:
Eighth Circuit Opinion, October 23, 1987 ..... 86A

Appendix H:
Eighth Circuit Opinion, September 22, 1987 .... 87A

Appendix I:
District Court Memorandum and Order,
February 18, 1987 ..... 93A

Appendix J:
District Court Memorandum and Order,
November 21, 1986 ..... 111A

TABLE OF AUTHORITIES

FEDERAL CASES

Arkansas, Louisiana Gas Co. v. Hall,
453 U.S. 571 (1981) 14, 18

Carr v. Southern Co.,
731 F. Supp. 1067 (S.D.Ga. 1990) 15, 16

County of Suffolk v. Long Island Lighting Co.,
907 F.2d 1295 (2nd Cir. 1990) 12, 19, 20, 22

H. J. Inc. v. Northwestern Bell,
954 F.2d 485 (8th Cir. 1992) 3

H. J. Inc. v. Northwestern Bell,
734 F. Supp. 879 (D. Minn. 1990) 2, 8, 13, 14, 17

H. J. Inc. v. Northwestern Bell Telephone Co.,
492 U.S. 229 (1989) 2, 7, 13, 21

H. J. Inc. v. Northwestern Bell Telephone Co.,
648 F. Supp. 419 (D. Minn. 1986) 2

H. J. Inc. v. Northwestern Bell Telephone Co.,
829 F.2d 648 (8th Cir. 1987) 2

Maislin Industries, U.S. v. Primary Steel, Inc.,
110 S.Ct. 2759 (1990) 14

Sedima SPRL v. Imrex Co., Inc.,
473 U.S. 479 (1985) 13, 16, 22

Southern Union Company v. Federal Energy Regulatory
Comm'n, 857 F.2d 812 (D.C.Cir. 1988), cert.
denied, ____ U.S. ____, 110 S.Ct. 1118,
107 L.Ed.2d 1025 (1990) 18

Taffet v. Southern Company,
930 F.2d 847 (11th Cir. 1991) 12, 14, 15, 16
..... 17, 18, 20, 21, 22

United States v. Turkette,
452 U.S. 576 (1981) 13, 22

STATE CASES

In the Matter of the Minnesota Public Utilities Commission,
417 N.W.2d 274 (Minn. Ct. App. 1987), cert. denied, 488 U.S. 849 (1988) 11

DOCKETED CASES

Wegoland Ltd. v. Nynex Corp. et al.,
No. 90 CIV. 496, Slip Op. at 16 (SDNY Sept. 26, 1991) 20

STATUTES

18 U.S.C.A. § 1961 3

18 U.S.C.A. § 1961(3) 16

18 U.S.C.A. § 1962 ..... 4, 16

28 U.S.C. § 1254(1) 3

28 U.S.C. § 2101(c) 3

Minn. Stat. § 609.42 ..... 6, 8, 10

Pub. L. No. 91-452, § 904(a),
84 Stat. 947 (1970) 16

18 U.S.C. §§ 1961-1968 . . . . . 6, 7, 12

18 U.S.C. §§ 1962(a), (b), (c) and (d) 6, 10

MISCELLANEOUS

State of Minnesota v. Northwestern Bell Telephone Co.,
C8-87-487340 (Ramsey County District Court) 11

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. _____

H. J. Inc., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The complaint in this case was originally served and filed on July 15, 1986. Initially, Respondents made motions to dismiss before the Minnesota Federal District Court. The trial court granted Respondents' motion, finding that Petitioner had not alleged a pattern of racketeering activity under RICO. The Eighth Circuit affirmed the dismissal. The case was subsequently appealed to the United States Supreme Court where the findings of the District Court and the Eighth Circuit were reversed and the case remanded. The district court has again dismissed, holding that the filed rate doctrine barred Petitioners' RICO claims. The Eighth Circuit recently affirmed this holding. There are currently six opinions in this case, all based on preliminary motions.

The opinion of the Eighth Circuit affirming the district court's dismissal of Petitioners' complaint, filed January 15, 1992, is not yet officially reported. The most recent district court opinion, which dismissed Petitioners' complaint based on the filed rate doctrine and the doctrines of primary jurisdiction and clear statement, was filed on April 4, 1990. It is officially reported at 734 F. Supp. 879 (D. Minn. 1990).

Prior to these most recent decisions, this case had been heard before this Court on the issue of whether Petitioners had adequately alleged a RICO pattern of racketeering activity. This Court determined that the pattern was adequately alleged, and the case was remanded to the lower courts for further consideration. The Supreme Court opinion is officially reported at 492 U.S. 229 (1989). The Eighth Circuit opinion decided prior to the United States Supreme Court decision is officially reported at 829 F.2d 648 (8th Cir. 1987). The original opinions of the district court, filed November 21, 1986 and February 10, 1987, are officially reported at 648 F. Supp. 419 (D. Minn. 1986).

The current Eighth Circuit opinion, reported at 954 F.2d 485 (8th Cir. 1992), is reprinted in the Appendix, beginning at 3A. The district court opinion filed on April 4, 1990 is reprinted in the Appendix beginning at 27A. The United States Supreme Court opinion, filed on June 26, 1989, is reprinted in the Appendix beginning at 51A. The Eighth Circuit opinion filed on September 22, 1987 is reprinted in the Appendix beginning at 87A. The initial district court decisions filed November 21, 1986 and February 8, 1987, are reprinted in the Appendix at 111A and 93A respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). The judgment affirming the federal district court's dismissal of Petitioners' complaint was entered on January 15, 1992. This Petition is timely, having been filed within ninety (90) days of that date.

PROVISION OF STATUTE INVOLVED

The statutory provisions of Title 18, United States Code, added by Title IX (RICO) of P.L. 91-452, in relevant part, provide:

> § 1961. Definitions.
>
> As used in this chapter-
>
> (1) "racketeering activity means ... any act which is indictable under any of the following provisions of title 18, United States Code: ... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) ... section 1951 (relating to ... extortion) ... section 2314 ... (relating to interstate transportation of stolen property) ...
>
> * * *
>
> (3) "person" includes any individual or

entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

§ 1962. Prohibited activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....

(b) It shall be unlawful for any person through a pattern of racketeering activity or through

collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections ... (c) of this section.

The relevant statutory provisions contained in Volume 84 of the *Statutes at Large* at 947 provides:

Section 904. (a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.

(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below.

This is a class action arising under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68. Petitioners filed and served their original Summons and Complaint on July 8, 1986. Plaintiffs' First Amended Complaint was filed and served on July 15, 1986. Petitioners alleged that Respondents committed acts of bribery in violation of 18 U.S.C. §§ 1962(a), (b), (c) and (d). In addition to federal claims, Petitioners alleged state law violations pursuant to the court's pendant jurisdiction which consisted of acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and common law bribery.

Respondent Northwestern Bell Telephone Company (Northwestern Bell) thereafter filed motions to dismiss on a number of theories. Oral arguments were heard in the district court on October 1, 1986. By Order dated November 21, 1986, the Minnesota Federal District Court granted Northwestern Bell's motion to dismiss the complaint in its entirety on the grounds that the Petitioners had failed to allege a "pattern" of racketeering activity and, on the 1962(a) count, that Petitioners had not alleged a person/enterprise distinction. In addition, the court found that under the "filed rate" doctrine, Petitioners' cause of action was not federally cognizable.

Petitioners filed a Motion to Amend or Reconsider on December 3, 1986. On February 10, 1987, the trial court denied the Motion to Reconsider. Petitioners appealed to the Eighth Circuit on March 20, 1987. Oral arguments were heard on September 2, 1987 and the Opinion, affirming the trial court's dismissal of the complaint because Petitioners had failed to allege a RICO pattern of racketeering activity, was filed on September 22,

1987. On October 4, 1987, Petitioners filed a Petition for Rehearing En Banc which was denied on October 23, 1987.

On January 20, 1988, Petitioners filed for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The question presented by Petitioners at that time was whether Petitioners had alleged a pattern of racketeering activity under RICO, 18 U.S.C. §§ 1961-68. This Court granted certiorari and oral arguments were heard on November 8, 1988. On June 26, 1989, this Court issued its opinion reversing the Eighth Circuit's determination that no pattern had been alleged and remanded the case for further proceedings. H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989).

On remand, the Eighth Circuit noted that the district court had dismissed Petitioners' complaint on issues other than that reversed by the Supreme Court. One of these issues, whether the filed rate doctrine precluded enforcement of the Federal RICO statute, remained on appeal. The Eighth Circuit declined at that time to consider this issue. Accordingly, the Eighth Circuit vacated the district court's order dismissing the complaint for failure to state a claim under RICO and remanded the case for further proceedings in light of the Supreme Court's opinion. (Order on Remand, October 30, 1989 48A.)

Respondents then moved the district court to reinstate its former judgment of dismissal based on the filed rate doctrine and the person/enterprise pleading in Count II of Petitioners' complaint. The matter was heard before the Federal District Court on January 18, 1990. On April 4, 1990, the district court dismissed Petitioners' complaint in its entirety with the unsupported statement that "the Court is satisfied that Congress did not intend that the additional sanction of treble damages should be available against defendants under RICO for actions alleged in plaintiffs' com-

plaint." H. J. Inc. v. Northwestern Bell, 734 F. Supp. 879, 888 (D. Minn. 1990).

Petitioners again appealed to the Eighth Circuit. Oral arguments were heard on March 14, 1991. On January 15, 1992, the Eighth Circuit issued its opinion affirming the district court's dismissal of Petitioners' complaint, finding that the filed rate doctrine precluded Petitioners from pursuing their cause of action. Petitioners now seek certiorari.

B. Factual Allegations.

Petitioners allege that from January 1, 1980 through 1986, Northwestern Bell Telephone Company conducted multiple schemes in which it attempted or offered, gave or promised to give, directly or indirectly, to the public officials who were duly appointed commissioners of the Minnesota Public Utilities Commission (MPUC), benefits, rewards and considerations to which they were not legally entitled. These actions constitute bribery under Minn. Stat. § 609.42. These bribes, Petitioners allege, were made with the intent to influence MPUC officers with respect to the performance of their duties. Specifically, Petitioners allege the following racketeering acts of bribery:

> (1) Northwestern Bell lobbyist Roy Weir negotiated regarding the employment of commissioner Roger Hanson with Northwestern Bell while Roger Hanson was still a commissioner. This occurred in 1984. These negotiations were discussed and approved by Gene Bier, Northwestern Bell Chief Executive Officer at that time. (Amended Complaint, ¶ 37.)
>
> (2) Former Commissioner Roger Hanson received payments in excess of $30,000 from Northwestern Bell Telephone Company during the

year of 1985. These payments were not directly paid to Roger Hanson, but were made to St. Paul attorney Robert W. Johnson and passed on to Roger Hanson. (Amended Complaint, ¶ 38.) These payments occurred while Roger Hanson was sitting on the Minnesota Public Utilities Commission. (Amended Complaint, ¶ 39.)

(3) Northwestern Bell Executives Thomas Madison and Roy Weir negotiated employment with Northwestern Bell with Commissioner Juanita Satterlee while she was still a member of the Commission. This occurred in the Spring of 1983. (Amended Complaint, ¶ 40.)

(4) Between the summer of 1983 and December 1983, Northwestern Bell paid former Commissioner Juanita Satterlee $106,129.00 as "consultation fees." (Amended Complaint, ¶ 41.)

(5) Between July, 1980 and 1986, Northwestern Bell paid for presents for MPUC commissioners, paid for parties for MPUC commissioners, and paid for meals for MPUC commissioners. The value of these items totalled thousands of dollars. (Amended Complaint, ¶ 42.)

(6) Between the years 1984 and 1986, MPUC Commissioner Harry Crump was provided with tickets to various sporting events. Northwestern Bell paid for these tickets. (Amended Complaint, ¶ 34.)

(7) During the years 1981 to 1984, Northwestern Bell executives also provided MPUC Commissioner Leo Adams with tickets to sporting

events. (Amended Complaint, ¶ 35.)

(8) On June 26, 1985, Ray Larson provided MPUC Commissioner Harry Crump with a free airline ticket between Oklahoma and Minneapolis. (Amended Complaint, ¶ 31.)

(9) In September of 1985, Northwestern Bell provided MPUC commissioner Harry Crump with an all expense paid day at Canterbury Downs Racetrack located in Minnesota. (Amended Complaint, ¶ 32.)

(10) Between the years 1984 and 1986, Northwestern Bell also provided Broadway tickets to MPUC commissioner Harry Crump. (Amended Complaint, ¶ 33.)

These acts are those known by Petitioners without the benefit of any discovery. Petitioners' complaint alleged that these acts constituted bribery of MPUC commissioners and sought civil recovery based on the violation of Minnesota's criminal bribery statute, Minn. Stat. § 609.42, subd. 1(1) and (2), and for common law bribery. Petitioners have also alleged that such acts violate the federal RICO statute, §§ 1962(a), 1962(b), and 1962(c). Petitioners also alleged a conspiracy under RICO § 1962(d). Petitioners represent a class which seeks RICO damages, reasonable attorneys' fees, injunctive relief, and other relief as the court deems just and equitable.

While Petitioners' case was pending, the Minnesota Attorney General petitioned the Minnesota Public Utilities Commission to reopen and reconsider NWB 83-600, a proceeding on a rate increase that Northwestern Bell requested in 1983. The rate increase of $57,148,000 was granted by the Commission on September 26, 1984. The Attorney General's action was based on

allegations similar to those contained in Petitioners' complaint. The commission did indeed reconsider the hearing and reduced the illegal increase from $57,148,000 to $45,603,000.

Northwestern Bell appealed the case to the Minnesota Court of Appeals in 1987. The Minnesota Court of Appeals held that the commission could properly reopen and vacate the illegal rate. In the Matter of the Minnesota Public Utilities Commission, 417 N.W.2d 274, 282 (Minn. Ct. App. 1987), cert. denied, 488 U.S. 849 (1988). The Minnesota Court of Appeals also determined that the number and timing of the ex parte contacts between Northwestern Bell and the commissioners sustained an inference that Northwestern Bell's actions were intended to influence the Commission's decision in NWB 83-600, and further found that the record more than supported that the contacts affected the final decision. Id.

After reviewing the illegal activities, the Commission concluded that it lacked further authority to grant a remedy. The Attorney General of the State of Minnesota then brought suit against Northwestern Bell in Minnesota Ramsey County District Court to order a refund. State of Minnesota v. Northwestern Bell Telephone Co., C8-87-487340 (Ramsey County District Court). This case was settled on September 23, 1989 and resulted in a refund of $31,900,000 plus interest. This settlement took place separate from the instant litigation. This instant action was brought well before the Attorney General's actions which only considered the illegal acts of defendants as regards one rate. However, Petitioners' seek, inter alia, RICO damages regarding the Northwestern Bell 83-600 rate, which has already been recognized to have been tainted by Respondents' acts of bribery. Petitioners also seek review of the other Northwestern Bell rate increases which were tainted by bribery and not addressed by either the Attorney

General or the Commission.

REASONS FOR GRANTING THE WRIT

Petitioners in the instant case have brought an action under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68. This cause of action is brought under an Act of Congress based on Northwestern Bell's alleged bribery of the Minnesota Public Utilities Commission. A wrong has been committed by Northwestern Bell: the remedy for that wrong is RICO. Recently, however, the Minnesota Federal District Court determined, and the Eighth Circuit Court of Appeals affirmed, that the filed rate doctrine bars the enforceability of RICO in this action. This "filed rate exception" creates a conflict among the circuits and is contrary to previous rulings of this Court.

Prior to the Eighth Circuit's most recent ruling, two jurisdictions had reviewed cases involving the question of whether RICO is applicable to regulated utilities. These cases are Taffet v. Southern Company, 930 F.2d 847 (11th Cir. 1991) and County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2nd Cir. 1990)("LILCO"). Both courts had ruled that utilities were not exempt from RICO. Taffet specifically considered the issue of whether the filed rate doctrine precluded application of RICO to regulated utilities and ruled that this doctrine did not bar plaintiffs from pursuing their RICO claim. The LILCO court reviewed RICO's application in light of other federal exemption doctrines and found that RICO does apply to a regulated utility. The instant Eighth Circuit decision is in direct contradiction of the rulings in the Eleventh and Second Circuits. As such, the opinion creates a conflict among the circuits which this Court must now resolve.

The Eighth Circuit's opinion is also contrary to prior RICO interpretations by this Court. The Eighth Circuit has once again

tried to impose a limitation on RICO's reach by exempting regulated utilities, such as Northwestern Bell, who are culpable under the statute. This Court has previously rejected such attempts to limit RICO. See H.J. Inc., 492 U.S. 229 (1989)(rejecting argument that RICO applies only to "illegitimate business"); Sedima SPRL v. Imrex Co., Inc., 473 U.S. 479 (1985)(rejecting lower court holdings that private RICO actions were permitted only where the defendant had been convicted on criminal charges and only where a "racketeering injury" had occurred); United States v. Turkette, 452 U.S. 576 (1981)(rejecting limitation on RICO enterprise as including only legitimate businesses). This Court now must reject the view that there is yet another exception - a "filed rate" exception or a "regulated utilities" exception to the RICO statute.

I. This Court Should Grant Certiorari to Resolve a Conflict Among the Circuits.

In dismissing Petitioners' complaint, the district court concluded that "the Court is satisfied that Congress did not intend that the additional sanction of treble damages should be available against defendants under RICO for the actions alleged in plaintiffs' complaint." H. J. Inc. v. Northwestern Bell, 734 F. Supp. 879, 888 (D. Minn. 1990). In affirming the district court, the Eighth Circuit upheld this exception to the enforcement of the RICO statute, apparently with the view that application of RICO in the instant case would not enhance the rate making process. The district court and the Eighth Circuit, in essence, have carved out an impermissible implied immunity from RICO jurisdiction for Northwestern Bell based on its status as a regulated utility. In so doing, the Eighth Circuit has directly contradicted the rulings in the Eleventh and Second Circuits, which have faced factual situations similar to

the case at bar, and has thereby created a conflict among the circuits. As with its prior RICO rulings on pattern which were reversed by this Court in 1989, the Eighth Circuit continues to stray from the language of the statute, the teachings of other circuit courts and the directives from this Court. This Court has the present opportunity to resolve this conflict among the circuits.

In the instant case, the district court dismissed Petitioners' complaint ruling that the RICO claims were barred by the filed rate doctrine. 734 F. Supp. at 882-84. The district court supported its dismissal based on the doctrines of abstention and clear statement. Id. at 886-88. The Eighth Circuit affirmed the district court's dismissal based upon the filed rate doctrine alone, although it did note that these doctrines supported its conclusion.

The filed rate doctrine arose from cases interpreting the Interstate Commerce Act and the relationship between shipper and carrier. Maislin Industries, U.S. v. Primary Steel, Inc., 110 S.Ct. 2759, 2765 (1990)("...this Court has long understood that the filed rate governs the legal relationship between shipper and carrier.") Basically, the filed rate doctrine states that a regulated entity may not charge rates for its services other than those properly filed with the appropriate federal regulatory authority. Arkansas, Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981). The purpose of the doctrine is (1) to preserve the regulating agency's authority to determine the reasonableness of rates and (2) to make sure that the entities charge only those rates which the agency has approved. Id. at 577-78.

In Taffet v. Southern Co., 930 F.2d 847 (11th Cir. 1991), the court considered the application of RICO to two utilities. Plaintiffs' complaint alleged that as early as 1981, two subsidiaries of the Southern Company, Georgia Power Company and the Alabama Power Company, engaged in improper accounting

practices. The effect of these improper practices was to overstate the utility's expenses and understate their income. Originally, two separate actions were filed - Taffet v. Southern Co. from the Middle District of Alabama, and Carr v. Southern Co., 731 F. Supp. 1067 (S.D.Ga. 1990) from the Southern District of Georgia. The two cases were consolidated for review by the Eleventh Circuit. Taffet, 930 F.2d at 849.

In Taffet, the plaintiffs alleged that in 1982, the Georgia Power Company and the Alabama Power Company devised schemes to cover up their wrongful accounting. The two utilities declared to the IRS only a small portion of their inventory and each utility allegedly kept a dual set of books, one of which was for the IRS. Id. at 850. The improper accounting methods which were employed by the utilities were profitable because they resulted in a reduced or deferred tax burden and also influenced the rates the utilities could charge their customers for services. In both Alabama and Georgia, the rates are established by the Public Service Commission (PSC) which sets rates according to profitability of the utility. Id. The PSC was more likely to approve a rate increase based on how small the utility's income appeared. Id.

The defendants in both actions filed motions to dismiss before their respective federal district courts. The defendant's motion was granted against the Taffet class on the grounds that the clear statement doctrine, abstention, the primary jurisdiction doctrine, and the filed rate doctrine barred the complaint. Defendant's motion was granted against the Carr class on the same grounds. The Eleventh Circuit therefore considered on appeal each of the grounds cited by the district courts for dismissal.

The Eleventh Circuit first considered the clear statement doctrine. It noted that the Taffet district court opinion stated that there was nothing in the language of RICO which specifically

indicated that Congress had intended RICO to apply to utilities. Id. at 851. The Carr district court specifically held that RICO was inapplicable to an electric company. Id. at 851-52. The Eleventh Circuit rejected these holdings, observing that the clear statement doctrine is used only where the statute is ambiguous. The Taffet court stated:

> RICO, on the other hand, is totally unambiguous on its face. Id. at 1308. The statute prohibits "any person" from violating its proscriptions. See id. at 1305; 18 U.S.C.A. § 1962. The statute then defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property." See id.; 18 U.S.C.A. § 1961(3). Therefore, because a utility is a legal entity which can hold property, RICO should apply to utilities. Id. at 1308.
>
> Moreover, Congress has explicitly stated that RICO should be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Those remedial purposes, according to the Supreme Court, are most evident in private causes of action brought by those injured as a result of racketeering. Sedima v. Imrex Co., Inc., 473 U.S. 479, 498, 105

S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985).

Id. at 852. The Eleventh Circuit therefore rejected the determinations of both district courts that RICO did not apply to public utilities.

In the instant case, the district court, stated that "the Court is satisfied that Congress did not intend that the additional sanction of treble damages should be available against defendants under RICO for the actions alleged in plaintiffs' complaint," 734 F. Supp. 879, 888 (D. Minn. 1990). The district court, similar to the district courts in Taffet and Carr, carved out a utility exception to the RICO statute. On appeal to the Eighth Circuit, Petitioners argued that there was no "public utility" exception to the RICO statute; on its face, RICO applies to violators of its provisions. The Eighth Circuit's affirmation of the Minnesota District Court's ruling is therefore directly contrary to the Eleventh Circuit's determination that RICO applies to utilities. This Court must determine whether such an exception to the enforcement of the RICO statute exists.

The Eleventh Circuit also analyzed whether the filed rate doctrine precluded the application of RICO to the plaintiffs' claims. The Taffet court observed that the Supreme Court has applied the doctrine in cases where one party has defrauded another. However, the Taffet court also held that:

> The [Supreme] Court, however, has never applied the doctrine when faced with a claim that a fraud has been committed upon the agency itself. See H. J. Inc., 109 S.Ct. at 2898, n. 1 (declining to address whether the filed rate doctrine barred

> a RICO claim alleging that telephone utility bribed officials in state agency to get higher rate); Arkansas, 453 U.S. at 583, n. 13, 101 S.Ct. at 2933, n. 13, 101 S.Ct. at 2933 n. 13. ("We save for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct."); Southern Union Company v. Federal Energy Regulatory Comm'n, 857 F.2d 812, 818 (D.C.Cir. 1988)(recognizing that the Arkansas case opened the door to an equitable exception to the filed rate doctrine in cases of fraudulent conduct), cert. denied, ____ U.S. ____, 110 S.Ct. 1118, 107 L.Ed.2d 1025 (1990).

Id. at 855. The Taffet court later stated: "Because the filed rate doctrine does not apply to a situation, such as that presented in the cases at bar, in which the defendants have fraudulently subverted the rate making process itself by presenting the agency with false information, the rate which resulted from fraud cannot be said to be the legal one." Id. at 856-57. In reaching this conclusion, the Taffet court clearly recognized a fraud exception to the filed rate doctrine.

Petitioners also proferred this issue before the Eighth Circuit. Petitioners alleged that because this case specifically involved the subversion of the rate making process through bribing commissioners on the Minnesota Public Utilities Commission, the filed rate doctrine should not bar Petitioners' claims in the face of

fraud or bribery. In response to Petitioners' arguments, the Eighth Circuit specifically stated "*...we reject the H. J. class's argument that the filed rate doctrine does not apply in the face of fraudulent conduct.*" (Eighth Circuit Opinion, 16A)(emphasis added.) The Eighth Circuit and the Eleventh Circuit are clearly at opposite poles of this issue. There is no "middle ground" that other courts might take to ameliorate this division. For this reason, this Court, in its supervisory capacity, must address and resolve this conflict.

Likewise, the Eighth Circuit's opinion is in conflict with the Second Circuit's opinions. In County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2nd Cir. 1990)("LILCO"), the court addressed the enforceability of RICO against a public utility. Specifically, the court reviewed the trial court's holding "that RICO does not apply to this case." Id. at 1301. In LILCO, the proposed class consisted of all rate payers from 1974 to the present. The gravamen of the plaintiffs' complaint was that during the rate making process, the LILCO defendants repeatedly gave false testimony to the New York State Public Service Commission ("PSC"). Id. at 1300. This, the plaintiffs alleged, caused the PSC to grant LILCO unwarranted and excessive rate increases.

On appeal, the Second Circuit directly discussed the applicability of RICO to utilities: "We address now the ground upon which the district court based its decision to grant judgment N.O.V.: the inapplicability of RICO to public utilities." Id. at 1305. The court disagreed with the district court, and held "that public utilities, such as LILCO, are subject to the strictures of RICO." Id. In reaching this conclusion, the court observed:

> no specific language suggests, even remotely, that there is a public utility exception to RICO's general applicability. The statute simply

> prohibits "any person" from violating its proscriptions, 18 U.S.C. § 1962, and "person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property," id. § 1961(3). LILCO is unquestionably such an entity.

Id. The LILCO court also took note of Congress' admonition that RICO is required to be liberally construed to effectuate its remedial purposes. Id. Thus, the Eighth Circuit's determination that utilities are exempt from the purview of RICO is also in direct contradiction to the Second Circuit's recent holding.

The LILCO circuit court did not address the filed rate doctrine. Rather, it reviewed the application of RICO in the context of the doctrine of "clear statement" because the district court had based its opinion on that issue. However, the Second Circuit, if confronted with the issue of whether the filed rate doctrine precludes the application of RICO would adopt the Taffet reasoning. In Wegoland Ltd. v. Nynex Corp. et al., No. 90 CIV. 496, Slip Op. at 16 (SDNY Sept. 26, 1991), a case cited by the Eighth Circuit (Op. p. 12), a federal magistrate for the Second Circuit adopted the Taffet reasoning regarding the application of the filed rate doctrine to bar RICO. It determined that:

> To allow the utilities -- and the various unregulated defendants as well -- to get the benefit of a doctrine aimed at preventing price discrimination and preserving agency authority to regulate rates, in the face of a claim that they have engaged in systematic fraud on the

> very agencies charged with rate regulation would extend it beyond the limited purpose for which it was created and should not be permitted.

Id. at 16-17.

The Eighth Circuit's refusal to enforce RICO as an appropriate remedy against Respondents in this case has carved out an inappropriate exception to the RICO statute. The Second and Eleventh circuits have correctly ruled that no such exemption exists. The Eighth Circuit's decision is directly contradictory to the determinations of the Second and Eleventh Circuits. Hence, this Court should resolve this conflict among the circuits.

II. The Eighth Circuit's Opinion Is Irreconcilable With The Previous Decision Of This Court.

The district court, relying on the filed rate doctrine, primary jurisdiction, abstention and the doctrine of clear statement, stated that Congress did not intend RICO jurisdiction to reach defendants involved in a regulated industry. The Eighth Circuit in affirming the district court's dismissal of Petitioners' complaint sanctions that view.

A review of the Eighth Circuit's opinion is a deja vu experience. In H. J. Inc., Respondent and amici argued that RICO should not apply to "legitimate" defendants such as Northwestern Bell. This Court rejected these arguments and stated that "RICO's language supplies no grounds to believe that Congress meant to impose such a limit on the Act's scope." H.J. Inc., 492 U.S. at 244. This Court determined that judicially created limitations could not be grafted on to the pattern requirement to prevent RICO's application to unlawful acts which were designed to influence commissioners in carrying out their duties in order to win approval of unfair and unreasonable rates for Northwestern Bell. The

Minnesota District Court and the Eighth Circuit's decisions are irreconcilable with this conclusion.

The holding of the Eighth Circuit is furthermore rejected in light of the fact that this Court has consistently refused attempts to limit RICO. Sedima, SPRL v. Imrex Co. Inc., 473 U.S. 479 (1985) and United States v. Turkette, 452 U.S. 576 (1981) were this Court's most recent pronouncements regarding the application of RICO prior to the H. J. Inc. decision. Both Turkette and Sedima rejected attempts to place limitations on the statute. In Sedima this Court noted that civil RICO was being used against "respected and legitimate 'enterprises'" instead of against mobsters and organized criminals. It commented, however, that Congress wanted to reach both "legitimate" and "illegitimate" enterprises. Sedima, 473 U.S. at 499. This Court also stated that "[t]he fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued." Id. Finally, this Court noted the "self-consciously expansive language and overall approach" of Congress and its "express admonition that RICO is to be 'liberally construed to effectuate its remedial purposes . . . . '" Id. at 498 (citations omitted). This Court's admonitions in Sedima and Turkette were acknowledged and followed by the LILCO and Taffet courts and ignored by the Eighth Circuit. This Court must correct this error.

CONCLUSION

Once again this case comes before this Court petitioning it to resolve a conflict among the circuits and to direct the Eighth Circuit to properly apply the RICO statute. This case involves most serious allegations of bribery of government officials. It is incomprehensible that the filed rate doctrine should be used to shield a corrupt commission and utility from enforcement of Federal law. This Court must resolve these issues regarding whether RICO provides a remedy to Petitioners.

Dated: April 14, 1992

Respectfully submitted,

REINHARDT AND ANDERSON
MARK REINHARDT, #90530
SUSAN FORD BEDOR, #154702
E-1400 First National Bank Bldg.
332 Minnesota Street
St. Paul, Minnesota 55101
(612) 227-9990

COCHRANE & BRESNAHAN
JOHN COCHRANE, #09645
24 East Fourth Street
St. Paul, Minnesota 55101
(612) 298-1950

Attorneys for Petitioners

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

H.J. Inc., et al...	)	
Plaintiff,	)	Clerk's Notice
	)	
vs	)	CV. # 4-86 CV 546
	)	
Northwestern Bell, et al...	)	
Defendant.	)	
	)	

You are hereby notified that in the above-entitled cause, on the 18th day of February, 1992 WE FILED: a certified copy of the mandate from the United States Court of Appeals for the Eighth Circuit and a certified copy of the judgment that: After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

John Cochrane
Cochrane & Bresnahan
24 E 4th St
St. Paul, MN 55101

Mark Reinhardt
Reinhardt & Anderson
E-1400 First National BK Bldg
332 Minnesota St.
St. Paul, MN 55101

FRANCIS E. DOSAL, CLERK

By: _____
Deputy Clerk

James L. Volling
Faegre & Benson
2200 Norwest Center
90 S 7th St
Minneapolis, MN 55402-3901

Stephen T. Refsell
Northwestern Bell Telephone co.
Room 1800
200 South 5th St
Mpls., MN 55402

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-5245

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,	*	
Appellants,	*	Appeal from the United States District Court for the District of Minnesota.
v.	*	
Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,	*	
Appellees.	*	

Submitted: March 14, 1991

Filed: January 15, 1992

Before JOHN R. GIBSON and BOWMAN, Circuit Judges, and DUMBAULD,* Senior District Judge.

JOHN R. GIBSON, Circuit Judge.

This is the second appeal in this class action arising under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. § 1961 - 1968 (West 1984 & Supp. 1991). The H.J. class consists of all purchasers of "telecommunications goods and services" from Northwestern Bell Telephone Company between 1980 and 1986. The H.J. class alleged that Northwestern Bell bribed members of the Minnesota Public Utilities Commission for the purpose of influencing the officials in setting telephone rates in Minnesota. The H.J. class alleged violations of Minnesota's bribery statute, Minn. Stat. Ann. § 609.42 (West 1987), and Minnesota common law (Count I), and several provisions of RICO.[1] Counts II-V). The

*THE HONORABLE EDWARD DUMBAULD, United States Senior District Judge for the Western District of Pennsylvania, sitting by designation, concurred in the result reached by the court at conference but became ill and had not returned to work so as to be able to participate in the preparation of the opinion.

[1] Count II alleged that Northwestern Bell received income through its alleged acts of bribery and invested such income in its own operation in violation of 18 U.S.C. § 1962(a). Count III alleged that Northwestern Bell acquired or

district court[2] dismissed the H.J. class's complaint, holding that its RICO claims were barred by the filed rate doctrine and that its state law claims were barred by res judicata. H.J., Inc. v. Northwestern Bell Tel. Co., 734 F. Supp. 879, 888 (D. Minn. 1990). We affirm.

The procedural history of this case is lengthy. The district court first dismissed the H.J. class's complaint in 1986. H.J., Inc. v. Northwestern Bell Tel. Co., 648 F. Supp. 419 (D. Minn. 1986). The district court held that: (1) the H.J. class did not allege facts constituting a "pattern of racketeering activity" under RICO; (2) the H.J. class failed to state a claim under section 1962(a) of RICO because it failed to allege a RICO "enterprise" separate and distinct from a RICO "person"; and (3) the filed rate doctrine barred the H.J. class's claims. Id. at 434-29. The court granted Northwestern Bell's motion to dismiss the RICO counts, dismissed the pendent state law claim without prejudice, id. at 429-30, and later denied the H.J. class's motion for reconsideration. H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 916 (D. Minn. 1987).

This court affirmed the dismissal, holding that the H.J. class failed to allege a pattern of racketeering activity under RICO. H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648, 649-50 (8th Cir.

---

maintained interest or control of the Minnesota Public Utilities Commission through its acts of bribery in violation of 18 U.S.C. § 1962(b). Count IV alleged that Northwestern Bell was associated with the Commission and conducted and participated in the conduct and affairs of the Commission through its acts of bribery in violation of 18 U.S.C. § 1962(c). Count V alleged that Northwestern Bell and its employees conspired with Commission officials to violate RICO in violation of 18 U.S.C. § 1962(d).

[2] THE HONORABLE HARRY H. MACLAUGHLIN, United States District Judge for the District of Minnesota.

1987). We did not consider the other bases for the district court's dismissal. Id. at 650.

The Supreme Court reversed, holding that the H.J. class's complaint should not have been dismissed for failing to plead a sufficient pattern of racketeering activity. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The Court did not consider the other two grounds on which the district court had relied in dismissing the action. Id. at 234 n.1.

Following the Supreme Court's reversal, we remanded the case to the district court, H.J. Inc. v. Northwestern Bell Tel. Co., No. 87-5121, slip op. at 2 (8th Cir. Oct. 30, 1989), and Northwestern Bell renewed its motion for dismissal. The district court ordered dismissal of the H.J. class's complaint, ruling again that its RICO claims were barred by the filed rate doctrine. H.J., Inc., 734 F. Supp. at 882-84. The court found further support for its dismissal of the H.J. class's RICO claims in the doctrines of abstention and clear statement, id. at 886-88, concluding that "Congress did not intend that the additional sanction of treble damages . . . be available against defendants under RICO for the actions alleged in plaintiffs' complaint."[3] Id. at 888.

---

[3] Northwestern Bell had raised numerous other reasons for dismissal. In addition to claiming that Count II of the H. J. class's complaint should be dismissed because the H.J. class did not allege a "person" distinct from the RICO "enterprise" under section 1962(a), Northwestern Bell also argued that dismissal was appropriate because: (1) the Commission is not an appropriate "enterprise" under sections 1962(b) and (c); (2) the H. J. class did not allege the requisite "interest in or control of" the Commission on the part of Northwestern Bell within the meaning of section 1962(b); (3) Northwestern Bell is not "employed by or associated with" the Commission within the meaning of section 1962(c); (4) the H. J. class failed to allege Northwestern Bell's participation as a "principal" as required by section 1962(a); (5) the H. J. class failed to allege a "racketeering injury" by reason of Northwestern Bell's alleged violations of section 1962(a), (b), and (d); (6) the H. J. class failed to allege a proper RICO conspiracy pursuant to section 1962 (d); and (7) RICO's pattern requirement is unconstitutionally vague.

In addition to the lengthy procedural history of this case, there have been other proceedings relating to this case. Shortly after the district court's 1986 decision, the H.J. class brought a parallel action in Minnesota state court. In addition to its bribery and RICO claims, the H.J. class asserted a claim for unjust enrichment. The Minnesota Court of Appeals affirmed the state trial court's dismissal of the action, holding that: (1) there is no private right of action under Minnesota statutory or common law for damages caused by the alleged bribery of public officials; (2) the H.J. class's RICO claims were barred by res judicata; and (3) the H.J. class's unjust enrichment claim was barred by Minn. Stat. Ann. § 237.26 (West 1972) because it was a collateral attack on a rate-making decision of the Commission. H.J. Inc. v. Northwestern Bell Corp., 420 N.W.2d 673, 675-77 (Minn. Ct. App. 1988). The Minnesota Supreme Court denied the H.J. class's petition for review. H.J. Inc. v. Northwestern Bell Tel. Corp., No. CX-87-1843 (Minn. May 16, 1988). The district court dismissed with prejudice the H.J. class's state law bribery claims (Count I), ruling that the claims were barred by res judicata. 734 F. Supp. at 888.

While this case was pending, the Minnesota Attorney General petitioned the Commission to reopen and reconsider NWB 83-600, a proceeding on a rate increase requested by Northwestern Bell in 1983 and granted in 1984. The Minnesota Court of Appeals held that the Commission could properly reopen and vacate this rate. In re Minnesota Pub. Utilities Comm'n, 417 N.W.2d 274, 279-83 (Minn. Ct. App. 1987), cert. denied, 488 U.S. 849 (1988). As a result of the reconsideration, the Commission lowered the rate increase from $57,148,000.00 to $45,603,000.00. In May 1987,

---

The district court declined to consider these alternate grounds for dismissal. 734 F. Supp. at 888 n.3.

Northwestern Bell implemented new rates that are approximately $9 million per year lower than the rates that were in effect when the H.J. class brought this case. Because the Commission lacked authority to order refunds, the Attorney General for the State of Minnesota brought an action in Minnesota state court to compel Northwestern Bell to refund the difference between the original 1984 and reconsidered 1987 rates. The parties settled that action in September 1989, and Northwestern Bell has refunded approximately $32 million to telephone customers.

I.

The H.J. class first argues that the district court erred in holding that its RICO claims are barred by the filed rate doctrine. The H.J. class argues that the filed rate doctrine does not apply because: (1) Northwestern Bell cannot use the filed rate doctrine to shield it from its own fraudulent conduct; (2) the H.J. class did not ask the district court to set new rates; and (3) the filed rate doctrine is a federal doctrine that applies only to federal agencies.

The filed rate doctrine "forbids a regulated entity [from charging] rates for its services other than those properly filed with the appropriate federal regulatory authority." Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981). The filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue. Id. at 578-79.

The purpose of the filed rate doctrine is to: (1) preserve the regulating agency's authority to determine the reasonableness of rates; and (2) insure that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require. See id. at 577-78. The Supreme Court recently explained: "The duty to file rates with the Commission . . . and the

obligation to charge only those rates . . . have always been considered essential to preventing price discrimination and stabilizing rates." Maislin Ind., U.S. Inc. v. Primary Steel Inc., 110 S.Ct. 2759, 2766 (1990).

The district court, applying the same reasoning as it did in its 1986 dismissal, concluded that the filed rate doctrine barred the H.J. class's RICO claims because the class sought to recover damages amounting to the difference between the approved rates and the rates that would have been approved but for Northwestern Bell's wrongdoing.[4] H.J., Inc., 734 F. Supp. at 882-84; H.J., Inc., 648 F. Supp. at 428-29. In so ruling, the court relied on a line of federal cases, Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951); Arkansas-Louisiana Gas Co., 453 U.S. 571; Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986); and Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156 (1922). These cases held that the filed rate doctrine barred the various claims when the measure of damages is determined by comparing the approved rate and the rate that allegedly would have been approved absent the wrongful conduct. 734 F. Supp. at 882-84. The court also relied on two district court decisions, Carr v. Southern Co., 731 F. Supp. 1067 (S.D. Ga. 1990) and County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387 (E.D.N.Y. 1989) (LILCO), to support its dismissal of the H.J. class's RICO claims. After the district court's dismissal, however, the Eleventh Circuit reversed the district court's decision in Carr, and the Second Circuit, although affirming

---

[4] Plaintiffs' first amended complaint seeks damages for "the compensation Northwestern Bell was allowed to receive by the [Commission] . . . in excess of what would be fair and reasonable charges to plaintiffs . . . and that said unfair and unreasonable compensation was caused by the involvement . . . in bribery, attempts to bribe, conspiracy and racketeering activities . . .."

on other grounds, rejected the lower court's analysis in LILCO. See Taffet v. Southern Co., 930 F.2d 847 (11th Cir. 1991); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990).

- A -

The H.J. class first argues that the filed rate doctrine does not apply because the "doctrine has never been extended to protect a defendant from its own wrongdoing." The H.J. class claims that the doctrine has not been applied when the fraud that has been committed is extrinsic fraud or a fraud committed upon the agency itself. The H.J. class points to a footnote in Arkansas Louisiana Gas Co., in which the Court stated: "We save for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct." 453 U.S. at 583 n.13.

It is true that the Supreme Court has not considered the question of whether the filed rate doctrine applies when plaintiffs complain that the regulatory agency itself was involved in the alleged fraudulent conduct. We are convinced, however, that the underlying conduct does not control whether the filed rate doctrine applies. Rather, the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations. Support for this conclusion is found in the Supreme Court rulings applying the filed rate doctrine. For example, in Montana-Dakota Utilities Co., the Supreme Court applied the filed rate doctrine even when one party allegedly defrauded the other in reaching an agreement as to the rates each would charge. 341 U.S. at 248. In Montana-Dakota, the plaintiff sought to recover alleged overcharges from an electric company. Plaintiff exchanged electricity with the defendant electric company, and the electricity exchanges were made

pursuant to contracts which had been filed with the Federal Power Commission. Id. Plaintiff alleged that the filed and approved rates were fraudulent and unlawful because they were the product of an interlocking directorate. Id. The Supreme Court affirmed the dismissal of the claim, holding that the Federal Power Commission had the exclusive power to determine the reasonable rate for the interstate sale of electric power and that its decision was conclusive. Id. at 251-52.

Similarly, in Square D Co., the Supreme Court held that the filed rate doctrine barred plaintiffs' antitrust claim. 476 U.S. at 415-23. Plaintiffs complained that carriers and the Tariff Bureau (a nonprofit corporation engaged in collective rate-making activities) conspired to fix rates for transporting freight. Id. at 411-12. Because the rates had been filed with the Interstate Commerce Commission, the Court concluded it would have to measure damages based on the difference between the filed rates and what the rates would have been in a freely competitive market, and thus the filed rate doctrine barred plaintiffs' antitrust action. Id. at 415-17. In reaching this conclusion, the Court relied on Keogh, specifically observing that Congress had not overruled that decision despite opportunities to do so. Id. at 424.

In Keogh, a shipper sued several carriers, alleging that the carriers conspired to set arbitrarily high rates in violation of federal antitrust laws. 260 U.S. at 159-60. Plaintiff claimed that the carriers charged tariff rates that were "higher than the rates would have been" absent their illegal agreement. Id. at 160. The carriers had filed the tariff rates with the Interstate Commerce Commission, and the Commission approved the rates. Id. The Supreme Court held that plaintiff failed to state an antitrust action because the exclusive remedy was contained in the Act to Regulate Commerce, which provided for a damage recovery. Id. at 162-63. The Court

also held that the plaintiff could not recover damages for the alleged overcharges because the Commission's approval of the rate established the lawfulness of the rate. Id. at 163. The Court observed that antitrust relief would frustrate Congress' intent to ensure uniform rates and would require the Court to speculate about the rate that would have been set by the carriers and approved by the Commission absent the conspiracy. Id. at 163-65. The Court explained: "The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier . . . And they are not affected by the tort of a third party." Id. at 163 (citations omitted). The Supreme Court, recognizing the continuing validity of Keogh, recently quoted the first of these two sentences in Maislin Industries, 110 S. Ct. at 2766.

The H.J. class cites Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d 1465 (5th Cir. 1987), to support its contention that the filed rate doctrine does not apply when there is "active fraud." In Gulf States Utilities, the Fifth Circuit held that contracts in which the plaintiff agreed to purchase electricity from the defendant at prices which were then incorporated in rate filings might be set aside if the plaintiff could show that it had been fraudulently induced to enter into the contracts. Id. at 1471-72. The court, however, distinguished setting aside the contracts from setting aside the rates, noting that "setting aside the contracts . . . would not interfere with the [federal agency's] rate-making powers." Id. at 1472. The court stressed that "the district court may not set aside the contracts on the theory that [the defendant's] rates are too high." Id.

The H.J. class also points to Nordlicht v. New York Telephone Co., 617 F. Supp. 220 (S.D.N.Y. 1985), aff'd, 799 F.2d 859 (2d Cir. 1986), cert. denied, 479 U.S. 1055 (1987). There, the plaintiff, a New York resident, made telephone calls in Canada and

directed the Canadian telephone company to bill the cost of the calls to his account with defendant New York Telephone. 617 F. Supp. at 221. The Canadian company billed New York Telephone in Canadian dollars, and New York Telephone billed the plaintiff in the same amount of American dollars, despite a differing exchange rate. Plaintiff sought to recover the difference. Id.

The New York district court held that plaintiff's claim was barred by the filed tariff doctrine because the filed tariff authorized New York telephone to charge the specified rates in American dollars. Id. at 227. Nevertheless, the court observed that if the plaintiff had adequately alleged fraud, the outcome would be different:

> Claims of fraud are different. The filed tariff doctrine is designed to protect utilities charging filed rates for lawfully provided service. It is of no help to a defendant which fraudulently induces a plaintiff to pay a filed rate or which otherwise exacts payment by fraud. There is nothing in the policy underpinnings of the doctrine which would cause it to protect a defendant which unlawfully exacts payment, even at a lawful rate.

Id. at 227-28. The H.J. class says that this language shows that a fraud exception exists to the filed rate doctrine. However, the fraud claim in Nordlicht, which the court found to be inadequately pleaded, was that the plaintiff had been tricked into paying a rate that he should not have had to pay. Id. at 228. The claim did not attack the rate itself and did not require the court to "second-guess" the rate-making agency.

The H.J. class also argues that the filed rate doctrine does not apply when the fraud was "extrinsic to" the rates approved by the Commission. The class cites City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983), for support. In that case, we held that the filed rate

doctrine did not bar a city's antitrust action against an electric utility company. Id. at 1179. The city did not attack the individual rates, but instead complained of "anti-competitive effects resulting from the interaction of the rates. Id. We concluded that an award of antitrust damages based on an alleged price squeeze would not conflict with the regulatory agencies' authority to oversee rates because the city did not challenge the reasonableness determinations as to any of the filed rates. Id. We further supported our conclusion that the filed rate doctrine did not apply by observing that "the doctrine was created to protect customers, not competitors." Id. (citing Essential Communications Sys., Inc. v. American Tel. & Tel. Co., 610 F.2d 1114, 1121 (3d Cir. 1979)). Despite this latter statement, we made clear that if the city challenged the reasonableness of the individual rates in question, its claim would be barred. Id.

The district court in this case relied on Carr v. The Southern Co., 731 F. Supp. 1067 (S.D. Ga. 1990), in concluding that the filed rate doctrine barred the H.J. class's RICO claims. 734 F. Supp. at 884. In Carr, a class of electric power customers brought a RICO action alleging that the electric utilities had used fraudulent accounting methods to understate their net income in order to influence the rate-making process. Id. at 1068. The district court held that plaintiffs' claims were barred by the filed rate doctrine, Burford abstention, and the doctrine of clear statement. Id. at 1071-73.

After oral argument in this case, the Eleventh Circuit reversed the district court's decision in Carr Taffet v. Southern Co., 930 F.2d 847 (11th Cir. 1991). The Eleventh Circuit concluded that the filed rate doctrine did not bar plaintiffs' RICO claims. Id. at 856. The court considered the underlying purposes of the filed rate doctrine, and concluded that "[t]he possibility of a RICO action

against a utility which defrauds its [state rate-making agency] creates great incentive for that utility to present its [state agency] with accurate and truthful information. . . ." Id. As a consequence, the court held that permitting a RICO action would enhance, rather than infringe upon the state's authority to set reasonable and uniform rates, and thus, the filed rate doctrine did not apply. Id. Accord Wegoland Ltd. v. Nynex Corp., No. 90 Civ. 496, slip op. at 13-17 (S.D.N.Y. Sept. 26, 1991) (relying on reasoning of Second Circuit in LILCO to conclude that plaintiffs' RICO claims against telephone company are not barred by the filed rate doctrine).

The facts in this case differ from those in Taffet. Here, the Attorney General for the State of Minnesota petitioned the Commission to reopen certain of the rates charged by Northwestern Bell, resulting in a prospective rate decrease and a refund. The Minnesota Court of Appeals recognized that the Commission possessed "the implied authority to reopen judgments at any time based on the 'fraud on the court' doctrine" recognized by Minn. R. Civ. P. 60.02. 417 N.W.2d at 281-82.

It does not appear in Taffet that the states of Alabama or Georgia took such action. Indeed, in Taffet the court observed that state law prevented the plaintiffs from recovering any damages through the state agencies. 930 F.2d at 853 and n.5. The Taffet court held that the filed rate doctrine did not apply based on its conclusion that allowing a RICO action would provide "great incentive" for the utility to present its rate-making agency with "accurate and truthful information" upon which to base its rate decisions. Id. at 856. The court held that permitting a RICO action "would enhance rather than infringe upon the [agency's] authority to set reasonable and uniform rates." Id.

The Eleventh Circuit's rationale for refusing to apply the filed

rate doctrine does not apply here. In Taffet, the Commission did not reopen any prior rate decision. 930 F.2d at 853 and n.5. In Minnesota, however, the Commission may reopen the rates, and indeed, with respect to the 83-600 rate, has done so.[5] Although the Second Circuit did not discuss the application of the filed rate doctrine in County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990) (LILCO), the Attorney General for the State of New York stated that "an award of [RICO] damages . . . would enhance, rather than conflict with, New York's regulatory scheme," id. at 1309, and the Commission directed a letter to the court saying that the Commission did not intend to get involved in the federal action. Id.

While the Second and Eleventh Circuits in LILCO and Taffet, respectively, rejected the legal reasoning of the two lower court decisions relied upon by the district court here, it is apparent that the district court's analysis of the underlying Supreme Court decisions addressing the filed rate doctrine correctly recognized the strength and scope of the Court's opinions.

For these reasons, we reject the H.J. class's argument that the filed rate doctrine does not apply in the face of fraudulent conduct.

---

[5] Here, the Attorney General for the State of Minnesota submitted a letter stating that the settlement of the 83-600 case "was limited solely to restitution for overcharges in the 83-600 case," and that the Attorney General did not "inten[d] . . . to settle any other pending action." The Attorney General went on to state that "the continued litigation of the H.J., Inc. case can have no effect on the state's regulatory interest in the 83-600 case," and that he consider the "lawsuit to be a totally separate action that in no way conflicts with or infringes upon the Commission's authority or our settlement with respect to the 83-600 case." The important distinction between this case and Taffet is that in Minnesota a mechanism has been utilized whereby customers may recoup overcharges, and thus, the utilities have an incentive to provide truthful and accurate information to the Commission.

- B -

The H.J. class also argues that the filed rate doctrine does not apply because it does not ask the court to engage in rate-making activities. The H.J. class seemingly departs from its request for damages contained in its first amended complaint and says that it is not challenging the reasonableness of any rate the Commission previously approved, but instead, is seeking damages due to Northwestern Bell's RICO violations.

The H.J. class points to Litton Systems, Inc. v. American Telephone & Telegraph Co., 700 F.2d 785 (2d. Cir. 1983), cert. denied, 464 U.S. 1073 (1984). In Litton, the Second Circuit held that the filed rate doctrine did not bar the antitrust claims in issue:

> This case can be distinguished from Keogh and decisions holding the filed rate doctrine applicable, because the issue here is not the reasonableness of the interface tariff rate as compared to some other rate that might have been charged, but instead whether the [agency] requirement itself was reasonable, i.e., whether there should have been any charge at all.

Id. at 820 (citations omitted). We are unpersuaded by Litton. The H.J. class cannot contend that there could be no charge for telephone services. Rather, the H.J. class's claim is simply that its members have been injured because they paid too much for telephone services or that there could be no rate increases for the 1980-1986 period, a damage concept that falls squarely within the filed rate doctrine. Arkansas Louisiana Gas Co., 453 U.S. at 578-79 (plaintiffs request for damages "amounts to nothing less than the award of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case").

The H.J. class also relies on Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F.2d 1252 (9th Cir.

1982), rereported at 690 F.2d 1240, cert. denied, 459 U.S. 1227 (1983). In that case, plaintiff claimed that it was damaged because defendant prevented it from filing its rate with the Interstate Commerce Commission for two years. 674 F.2d at 1276. The Ninth Circuit refused to apply the filed rate doctrine for three reasons. First, there was no remedy under the Act to Regulate Commerce for plaintiff's claim. Id. Second, the action did not challenge the legality of the rate approved by the Commission, and therefore, "would not disturb any uniform rates." Id. Third, judicial relief would not involve speculation as to what the rate "might have been." Id.

The H.J. class claims that the circumstances here are similar to those in Clipper Exxpress because no other forum exists for it to bring its RICO claims, and the relief it seeks would not disturb uniform rates or require the court to establish rates.

We are not convinced by the H.J. class's reasoning. First, the class is not necessarily entitled to a forum to recover RICO damages. Although the Supreme Court in Arkansas Louisiana Gas did not consider whether the filed rate doctrine applied in the face of "affirmative misconduct," 453 U.S. at 583, the Court did acknowledge that application of the filed rate doctrine would leave plaintiff's alleged state-law violation unredressed. Id. at 584. Nevertheless, the Court accepted this result to prevent state laws from upsetting federal authority. Id. Similarly, in Square D, the Court held that private treble damages were not available under the Sherman Act, 476 U.S at 417-24, even though plaintiffs "alleged a valid antitrust action." Id. at 414.

Moreover, here, another forum exists for telephone customers to recover the alleged overcharges. See Keogh, 260 U.S. at 162 (plaintiff could recover damages under Act to Regulate Commerce). Indeed, at least so far as the 83-600 rate is concerned,

Northwestern Bell implemented a prospective rate decrease and refunded $32 million to telephone customers.

Second, we are persuaded that the relief the H.J. class seeks would, in fact, disturb uniform rates and the Commission's ratemaking decisions. Despite its urging the contrary, the H.J. class seeks damages that necessarily and plainly challenge the rates previously approved by the Commission. Cf. Clipper Exxpress, 674 F.2d at 1276; Litton, 700 F.2d at 820. As the Supreme Court observed in Arkansas Louisiana Gas, the damages the H.J. class seeks "amount[] to nothing less than the award of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case." 453 U.S. at 578-79.

The H.J. class responds that the court would not have to engage in a determination of just and reasonable rates because that amount has already been determined by the Minnesota administrative procedure, at least in relation to the 83-600 rate. The H.J. class asserts that the amount of the tainted increase was recognized as a matter of law when the Minnesota Court of Appeals ruled that the proceedings in the 83-600 case were tainted by Northwestern Bell's activities. In re Minnesota Pub. Util. Comm'n, 417 N.W.2d at 282-84. From this, the H.J. class gleans that all rates between 1980 and 1986 were tainted due to Northwestern Bell's bribery, and that its damages are equal to the amount of all rate increases during this time.

We cannot agree that the H.J. class's damages consist simply of all rate increases approved by the Commission between 1980 and 1986. Such a measure of damages would not only be speculative but also punitive. These damages would not be based on the H.J. class's alleged economic injury, as required by § 1964(c) of RICO. Section 1964(c) requires a RICO plaintiff to

prove injury to his business or property. 18 U.S.C. § 1964(c). See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) ("[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.").

Moreover, we are persuaded that using all rate increases as the measure of damages would impede state regulatory principles even more than a determination of the amounts in which the filed rates were excessive. For example, in the 83-600 reconsideration, the Commission determined that Northwestern Bell was entitled to a $45,603,000.00 rate increase. To use the difference between that amount and the amount of the original increase ($57,148,000.00) as the basis for setting damages would result in an award far exceeding the H.J. class's economic injury and would be inconsistent with Minnesota law entitling Northwestern Bell to receive a "fair rate of return" and charge "just and reasonable" rates. Minn. Stat. Ann. §§ 237.075, subd. 6; 237.081, subd. 4 (West Supp. 1992).

The H.J. class also asserts that other methods for determining damages exist without requiring the court to engage in judicial rate-making. The H.J. class points out that an administrative law judge initially examined all the rate requests, and that the Minnesota courts determined that the administrative law judge "was uninfluenced by [Northwestern Bell's] ex parte communications." 417 N.W.2d at 283. Based on this, the H.J. class suggests that the court can adopt as the basis for awarding damages the individual recommendations of the administrative law judge.

There is at least one fallacy in the H.J. class's reasoning. In the 83-600 case, the administrative law judge recommended a $36,100,000 rate increase. In its redeliberation, the Commission concluded that Northwestern Bell was entitled to a higher increase

than the one recommended by the administrative law judge. Thus, under the H.J. class's damage theory, it would recover the difference (trebled) between the originally approved rate of $57,148,000 and the $36,100,000 rate increase recommended by the administrative law judge, notwithstanding that the Commission, upon its redeliberation, approved the $45,600,000 rate.

We are convinced that the H.J. class's RICO damages can only be measured by comparing the difference between the rates the Commission originally approved and the rates the Commission should have approved absent the conduct of which the class complains. This is the exact measure of damages that the H.J. class requests in its first amended complaint. We reject the H.J. class's argument that the filed rate doctrine does not apply because it does not ask the court to engage in ratemaking activities.

- C -

The H.J. class also argues that the filed rate doctrine does not apply because the rates in question were promulgated by a state rather than a federal regulatory agency, and the filed rate doctrine is a federal doctrine that applies only to federal regulatory agencies. The H.J. class points out that all the cases relied on by the district court involved a federal cause of action and a federal agency. The H.J. class does not, however, direct us to any case law ruling that the filed rate doctrine applies only to rates promulgated by federal agencies, and we do not believe this distinction is the basis for the application of the filed rate doctrine.

In City of Kirkwood, we held that if the plaintiff challenged the reasonableness of wholesale power rates set by the Federal Energy Regulatory Commission or retail rates set by the Missouri Public Service Commission, the filed rate doctrine would bar its claim. See id. at 1179. We made no distinction between the rates

approved by the federal or state agencies. See id.

Although little case law exists on this question, we see no reason to distinguish between rates promulgated by state and federal agencies. We are persuaded that the rationale underlying the filed rate doctrine applies whether the rate in question is approved by a federal or state agency.

II.

We need not discuss in detail the district court's consideration of the clear statement doctrine or Burford abstention, as these rationales were not the basis for the district court's dismissal of the complaint, but simply provided "additional support" for its ruling that the filed rate doctrine barred the H.J. class's RICO claims. 734 F. Supp. at 884.

The district court rejected the H.J. class's argument that because the Commission has reconsidered the rates allegedly tainted by Northwestern's Bell's improper contacts and determined the amount of overcharging, no reason existed for the court to abstain. Id. at 886. The court reasoned that abstention doctrines "are concerned with preservation of the federal balance, and deference to the legitimate police powers of the states." Id. at 886 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976); United States v. Bass, 404 U.S. 336, 349 (1971)). The district court observed that the Minnesota Court of Appeals concluded that the H.J. class's unjust enrichment claim was barred by Minn. Stat. § 237.26 because such a claim constituted a collateral attack on the Commission's rate-making decisions. 734 F. Supp. at 886. The district court concluded that a treble damages award in the circumstances of this case would add "a severe sanction for the conduct in question for which the defendants would not otherwise be liable under state laws governing rate

making," id., and that the H.J. class's RICO claims similarly "constitute a collateral attack on state rate-making determinations." Id.

The Second Circuit recently addressed the clear statement[6] and Burford[7] abstention doctrines. LILCO, 907 F.2d at 1305-09. In LILCO, a county sued a utility and its former managers under RICO claiming that the defendants lied to the New York Public Service Commission to obtain higher electric rates. LILCO, 710 F. Supp. at 1389. After a verdict in the plaintiff's favor, the district court entered judgment notwithstanding the verdict for the defendants. The district court relied on the clear statement doctrine, Burford abstention, and federalism concerns underlying the tenth amendment. Id. at 1395-1404.

The Second Circuit rejected the district court's legal analysis, although affirming its judgment on other grounds. Concluding that the clear statement doctrine did not apply, the Second Circuit stated that the doctrine is a tool of statutory construction used when a statute or its legislative history is ambiguous, and that the RICO "statute is not ambiguous as to whether its proscriptions extend to a state-regulated public utility." Id. at 1306.

The Second Circuit also concluded that three circumstances weighed against the application of Burford abstention: that the

---

[6] The clear statement doctrine "counsels that a federal court should not apply a federal statute to an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power by application of the statute to that area." Taffet, 930 F.2d at 851. The rationale underlying the doctrine is to avoid Congress or the courts disturbing "'the federal-state balance.'" Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting Bass, 404 U.S. at 349)).

[7] Burford v. Sun Oil Co., 319 U.S. 315 (1943).

RICO action involved only federal claims; that it would not unduly disrupt the state's complex administrative process; and that treble damages and attorneys' fees were not available in an action before the state's regulatory agency. Id. at 1308-09.

Adopting much of the same reasoning, the Eleventh Circuit in Taffet held that Burford abstention did not warrant dismissal of plaintiffs' RICO claims. 930 F.2d at 852-54. In addition to relying upon the reasoning in LILCO, the Eleventh Circuit added that Burford abstention was not appropriate because the plaintiffs had no damage remedy before the state agency as the state agency could not award damages and could only set rates prospectively. 930 F.2d at 853 & n.5. The Eleventh Circuit also concluded that an award of damages under RICO would not disrupt "the state's attempt to establish a coherent policy" because the court could calculate damages by applying a "set of pre-established decisions and procedures" to estimate what a prior rate would have been in the absence of fraud, without passing judgment on a decision of the state regulatory agency or setting a prospective rate. Id. at 853-54.

Although we do not decide whether the clear statement doctrine or Burford abstention bars the H.J. class's RICO claims, we observe that the foundations for those doctrines support our holding that the filed rate doctrine bars the claims. It cannot be disputed that the regulation of public utilities is traditionally a state concern. See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States"); 28 U.S.C. § 1342 (1988) (prohibiting courts in certain circumstances from "enjoin[ing], suspend[ing] or restrain[ing]) the operation of, or compliance with, any order affecting rates chargeable by a public utility and made

by a State administrative agency or a ratemaking body of a State political subdivision . . .").

Here, as the district court observed, the Minnesota Court of Appeals concluded that Minn. Stat. § 237.26 barred the H.J. class's unjust enrichment claim. Allowing a RICO action for the identical conduct would similarly disrupt the state administrative process and constitute a "collateral attack on a rate order," contrary to state law. See H.J. Inc., 420 N.W.2d at 676. We also observe that the Minnesota appeals court concluded that no private right of action existed under Minnesota's common or statutory law for the alleged bribery. Id. These rulings by the Minnesota appeals court support the district court's observation that allowing a cause of action under RICO would cause a "serious disruption of state regulatory policy." 734 F. Supp. at 887-88 n.2.

We also note that the circumstances in both Taffet and LILCO are different from those here. In this case, the state agency, at least so far as the 83-600 rate is concerned, has already reviewed the 83-600 rate and determined it was "tainted." This resulted in a prospective rate decrease and a refund to telephone customers. Thus, not only are damages available through the state administrative process, they have actually been received.

III.

Finally, the H.J. class argues that the court erred in dismissing its pendent state law claims. The district court dismissed the H.J. class's state law claims because the Minnesota state courts already had decided the claims. 734 F. Supp. at 888.

The H.J. class asserts that the state court proceeding is not binding on this court because the decision was from the Minnesota Court of Appeals, not the Minnesota Supreme Court.

The H.J. class's argument misses the mark. The decision of

the Minnesota Court of Appeals is final as between these two parties and precludes relitigation in this action. See, e.g., Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action").

We affirm the dismissal by the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

H.J., Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Plaintiffs,

v.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E. F. as corporations, and other unnamed Co-conspirators,

Defendants,

CIVIL 4-86-546

MEMORANDUM AND ORDER

John Cochrane, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101, and Mark Reinhardt, Susan Bedor, Reinhardt & Anderson, 1014 Conwed Tower, 444 Cedar Street, St. paul, MN 55101, for plaintiffs.

John D. French, John F. Beukema, James L. Volling, Joseph H. Otterstetter, Faegre & Benson, 2200 Norwest Center, 90 South Seventh Street, Minneapolis, MN 55402-3901, for defendants.

This matter is before the Court on defendants' motion to dismiss plaintiffs' RICO claims, defendants' motion for reconsideration and reinstatement of judgment, and plaintiffs' motion for separate trial or severance.

FACTS

Plaintiffs' complaint alleges that beginning on July 1, 1980, defendant Northwestern Bell provided officials of the Minnesota Public Utilities Commission (MPUC) with various "benefits, rewards and considerations" for the purpose of influencing these officials in setting telephone rates of the state of Minnesota. In Count I, plaintiffs allege that such acts constituted bribery within the meaning of Minn. Stat. § 609.42, subd. 1(1), 1(2), and Minnesota common law. Upon these predicate acts of bribery, plaintiffs seek relief pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, et seq.

Plaintiffs' RICO allegations comprise the remaining four counts of the complaint, Counts II-V. Count II alleges that Northwestern Bell received income through its alleged acts of bribery and invested such income in its own operation in violation of 18 U.S.C. § 1962(a). Count III alleges that Northwestern Bell acquired or maintained interest or control of the MPUC through its acts of bribery in violation of 18 U.S.C. § 1962(b). Count IV alleges that Northwestern Bell was associated with the MPUC and conducted and participated in the conduct and affairs of the MPUC

through its acts of bribery in violation of 18 U.S.C. § 1962(c). Finally, Count V claims that Northwestern Bell and its employees conspired with MPUC officials to violate RICO, in violation of 18 U.S.C. § 1962(d).

Plaintiffs claim that they were damaged by reason of the above violations in that Northwestern Bell was permitted by the MPUC to charge rates in excess of what would have been determined to be fair and reasonable by the MPUC in the absence of the improper influences. They seek treble damages in accordance with 18 U.S.C. § 1984(c), punitive and exemplary damages, interest, costs and disbursements including attorneys' fees pursuant to 18 U.S.C. § 1964(c), and an injunction barring defendants from engaging in further illegal activity.

A. Procedural History

This action was filed July 8, 1986, and in September 1986 defendant Northwestern Bell moved to dismiss both the bribery count and the RICO claims. By order dated November 24, 1986 the Court dismissed the complaint on three grounds: (1) that the RICO claims failed to allege a sufficient pattern of racketeering activity; (2) that the action was barred by the "filed-rate" doctrine which provides that an administrative agency' s rate determination bars collateral attack in a judicial proceeding; and (3) that Count II failed to state a claim because it alleged that Northwestern Bell was both the "person" and the "enterprise" under section 1962 (a). H.J., Inc. v. Northwestern Bell Telephone Co., 648 F.Supp. 419 (D Minn. 1986). With the federal claims dismissed, the Court found no "unusual circumstances" warranting the exercise of jurisdiction over plaintiffs' pendent state law claims and those claims were dismissed without prejudice.

By order dated February 18, 1987, the Court denied

plaintiffs' motion for reconsideration, further elaborating on its ruling regarding the "pattern" requirement. H. J., Inc. v. Northwestern Bell Telephone Co., 653 F.Supp. 908 (D.Minn. 1987). The United States Court of Appeals for the Eighth Circuit affirmed dismissal based on the pattern requirement, but did not address the remaining grounds for dismissal. H.J., Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1987).

On June 26, 1989, the United States Supreme Court reversed, holding that the court of appeals erred in affirming the district court's dismissal for failure to plead a sufficient pattern of racketeering activity. On remand, the Eighth Circuit noted that rulings other than that reversed by the Supreme Court remained on appeal, but declined to consider them, finding:

> Those issues, notably dismissal of certain pendent state claims, and relatedly questions concerning collateral attack on rate orders by state regulatory bodies, were decided by the district court in light of that court's decision on the civil RICO claims. We observe that on remand the district court will be considering, and indeed possibly reconsidering, its rulings in context of the Supreme Court's opinion. Thus, it is entirely likely that some of the issues originally before both the district court and this court will not survive further proceedings. To say the least, their pursuance will be in different context.

Order or Remand dated October 30, 1989. Accordingly, the Eighth Circuit vacated this Court's order dismissing the complaint for failure to state a claim, and remanded for further proceedings. The court stated that on remand, the district court would be "at liberty to consider or reconsider such of its related and interdependent rulings as are, or may appear to be, appropriate." Id.

B. The Pending Motions

Defendants now move the Court to reinstate its former judgment of dismissal based on (1) the filed rate doctrine, and (2) the "person"/"enterprise" pleading defect in Count II. Defendants also raise the following other grounds in support of dismissal: (1) MPUC is not an appropriate "enterprise" under sections 1962(b) and (c); (2) plaintiffs do not allege the requisite "interest in or control of" the MPUC on the part of Northwestern Bell within the meaning of section 1962(b); and (3) Northwestern Bell is not "employed by or associated with" the MPUC within the meaning of section 1962(c); (4) that the complaint fails to allege Northwestern Bell's participation as a "principal" as required by section 1962(a); (5) that plaintiffs failed to allege a "racketeering injury" by reason of defendants' alleged violations of section 1962(a), (b), and (d); and (6) that plaintiffs failed to allege a proper RICO conspiracy pursuant to section 1962(d). Defendants also argue that RICO's pattern requirement is unconstitutionally vague. Finally, defendants argue that Count I of plaintiffs' complaint alleging state law bribery claims should be dismissed with prejudice in light of the rejection of such claims by the Minnesota Court of Appeals in plaintiffs' parallel action, H.J., Inc. v. Northwestern Bell Telephone Co., 420 N.W.2d 673 (Minn.Ct.App. 1988).

For the reasons stated below, defendants' motion to dismiss will be granted.

DISCUSSION

I. The Filed-Rate Doctrine

A. The Court's Reasoning in 1986

The Court's 1986 dismissal was based on, among other things, the filed-rate doctrine articulated by the United States Supreme Court in Montana-Dakota Utilities Co. v. Northwestern

Public Service Co., 341 U.S. 246 (1951). In Montana-Dakota, a public utility electric company sought to recover alleged overcharges from a second electric company with whom plaintiff had exchanged electric energy. The electricity exchanges were performed pursuant to inter-company contracts establishing rates and charges which had been filed with and accepted by the Federal Power Commission pursuant to the Federal Power Act. Plaintiff alleged that the rates which were filed and approved were fraudulent and unlawful, being the product of an interlocking directorate. The Court held that the district court was without power to determine what the reasonable rates should have been, and that this was a matter assigned by statute to the Federal Power Commission. Id. at 251. The Court held:

> Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.
>
> We hold that the right to a reasonable rate is the right to a rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.

Id. at 251-52.

This Court, in its 1986 opinion, also relied upon Arkansas-Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981). In Arkansas Gas,

the Court held that a natural gas producer was not entitled to damages from a natural gas purchaser measured by the difference between the rate filed with the Federal Power Commission and a rate which plaintiff alleged was due under a contract with defendant.

Citing Montana-Dakota, the Supreme Court reiterated the principle that the authority to decide whether rates were reasonable was vested solely in the Federal Power Commission, and that "no court may substitute its own judgment on reasonableness for the judgment of the Commission." Id. at 577. The Court noted that the considerations underlying the filed-rate doctrine "are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." Id. at 577-78. The Court concluded:

> No matter how the ruling of the Louisiana Supreme Court may be characterized, [defendant and the Commission] argue, it amounts to nothing less than the award of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case. This, they contend, is precisely what the filed rate doctrine forbids. We agree. It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act. Following that course would permit state courts to grant regulated sellers greater relief than they could obtain from the Commission itself.

Id. at 577-78.

In Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 106 S.Ct. 1922 (1986), a class of shippers brought suit against

motor carriers and the Niagara Frontier Tariff Bureau, Inc., a non-profit corporation organized to engage in collective rate-making activities pursuant to an agreement filed with and approved by the Interstate Commerce Commission (ICC). The complaint alleged that defendants engaged in a conspiracy, in violation of the Sherman Act, to fix rates for transporting freight between the United States and Canada and sought treble damages, measured by the difference between the rates they were required to pay and those which would have prevailed in a freely competitive market. Plaintiffs argued that the conspiracy was not exempted from a treble damages action even though the rates charged had been filed with the ICC. Id. at 1925. The Court relied upon Keogh v. Chicago & N.W. Railway, 260 U.S. 156 (1922) in which the Court barred actions based on federal antitrust laws for illegal price-fixing of utility rates on the grounds that:

> the legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier . . . and they are not affected by the tort of a third party. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress--prevention of unjust discrimination--might be defeated.

Keogh, 260 U.S. at 163. The Court in Square D declined to overrule Keogh, finding that it "represents a longstanding statutory construction that Congress has consistently refused to disturb, even when revisiting the specific area of law." Square D, 106 S.Ct. at 1929.

Plaintiffs argue that these cases are not controlling because at issue here is the impact of state rate-making procedures upon a

federal cause of action, while Montana-Dakota and Louisiana Gas concerned federal rate-making procedures and state law causes of action. Further, the Keogh doctrine addresses the impact of federal rate-making procedures on the federal antitrust cause of action, essentially a question of congressional intent. Thus, according to the plaintiffs, the concerns which prompted the Supreme Court to make the rate-making proceedings conclusive in the above cases are not present here.

Defendants respond by relying on principles of federalism and judicial restraint in the administrative sphere, and argue that for these reasons, Congress would not have intended RICO to be used in a way that interfered with state rate-making procedures. These issues were thoroughly explored in two recent cases involving RICO claims against state-regulated utilities: Carr v. The Southern Co., 1990 WESTLAW 21043 (S.D.Ga. Mar. 1, 1990) and County of Suffolk v. Long Island Lighting Co., 710 F.Supp. 1387 (E.D.N.Y. 1989). In Long Island Lighting, a county brought suit against the utility and its former managers under RICO claiming that defendants lied to the New York Public Service Commission (PSC) in order to obtain higher electric rates. Judge Weinstein noted that prior to trial the court had been of the view that the federal RICO statute took precedence over state rate-regulating policy. 710 F.Supp. at 1393. The court concluded after trial, however, that a jury should not be allowed to second-guess the rate-making authority of the state in a RICO trial. Id. at 1393. The court relied upon the doctrine of primary jurisdiction by which courts "stay or dismiss court proceedings pending resolution by the administrative agency of the issues within the latter's special competence." Id. at 1395, citing United States v. Western Pacific Railway, 352 U.S. 59, 63-64 (1956). The court held that the doctrine of primary jurisdiction suggested that RICO was an

inappropriate mechanism for challenging the state regulated utility rates. The court concluded that primary jurisdiction barred an action even when the alleged excessive rates were the result of misrepresentations to the administrative agency. Id. at 1396. The court rejected the argument that the primary jurisdiction doctrine did not apply where a federal statute and a state administrative proceeding were involved:

> [T]here is no reason to believe that allowing the PSC to set state electric rates and to exercise its own powers to roll back rates where it has been misled will frustrate RICO policy.

Id. at 1396. The court cited a number of cases in which federal courts have applied the doctrine where the claim is brought under federal antitrust law and the regulatory agency whose actions are in dispute is a state body. See, e.g., Huron Valley Hospital v. City of Pontiac, 666 F.2d 1029 (6th Cir. 1981). The court also relied upon the doctrine of Burford abstention, federalism concerns underlying the tenth amendment, and the "clear statement" doctrine.[1]

In Carr a class of electric power customers brought suit against electric utilities alleging that the utilities fraudulently employed accounting methods which inflated maintenance costs submitted to the Public Service Commission (PSC), and thereby obtained improper rate increases from the PSC. Plaintiffs based their claim under RICO, as well as the Sherman Antitrust Act, the Public Utility Holding Company Act, the Federal Power Act, and

---

[1] The court also cited the Johnson Act, 28 U.S.C. § 1342, which bars federal courts from "interfering" with state orders regarding utility rates in actions based on diversity of citizenship or constitutionality. The Act, while not applying by its terms to a RICO action, supplies additional evidence, according to the court, that rate-making functions are not to be disturbed by federal courts. Id. at 1398.

pendent state law causes of action. Citing the Long Island Lighting case in detail, the court held that the primary jurisdiction doctrine mandates that an agency, rather than a court, handle issues regarding special expertise, and that since plaintiff's case would necessarily involve the court in judicial rate-making, the primary jurisdiction doctrine barred all of plaintiff's federal claims. The court also relied on the doctrine of Burford abstention, concluding that the relief requested would require the court to delve into questions concerning local regulatory facts and problems, and further that the clear statement doctrine prevents intrusion of federal statutes into areas of traditional state concern unless Congress clearly indicates otherwise.

Judge Weinstein's thorough analysis, followed by the court in Carr, provides additional support for the Court's 1986 ruling that the Court is barred from entertaining an action which would second-guess the MPUC's rate-making decisions.

B. Impact of the MPUC's Rate Reconsideration

Plaintiffs argue that the rationale underlying this Court's 1986 decision no longer applies because of the MPUC's decision to reopen certain of the rates charged by Northwestern Bell in light of the bribery allegations. On July 9, 1986, the Minnesota Attorney General petitioned the MPUC to reopen and reconsider docket 600, the proceedings on the rate increase requested by Northwestern Bell in 1983 which culminated in a rate increase on September 26, 1984 of $57,148,000. The Attorney General's request was based on an MPUC internal investigation, referred to as docket 177, concerning alleged improper contacts between former MPUC commissioners Leo Adams and Roger Hanson, and Northwestern Bell representative Roy Weir, during the pendency of docket 600. The commission approved the Attorney

General's petition, and on April 2, 1987, the commission issued a final order vacating the 1984 rate order and reopening that order for further deliberation. See Matter of Minnesota Public Utilities Commission, 417 N.W.2d 274, 276-78 (Minn.Ct.App. 1987), review denied, cert. denied, Northwestern Bell Telephone Co. v. MPUC, 109 S.Ct. 130 (1988). As a result of this reconsideration, the commission issued a prospective rate decrease from $57,148,000 to $45,603,000. On appeal, the Minnesota Court of Appeals held that the commission could properly reopen and vacate its 1984 rate order based upon a theory of "fraud on the tribunal." Id. at 282. According to the court, the commission determined that the number and timing of the ex parte contacts between Northwestern Bell and commissioners Hanson and Adams sustained the inference that Northwestern Bell's actions were intended to influence the commission's decision in docket 600. Id. The court concluded that:

> The record supports the Commission's determination. During the time the Commission was deliberating on Northwestern Bell's petition for a rate increase, numerous meetings were held between Weir and Commissioner Adams and Hanson. Those meetings were all paid for by Northwestern Bell. The dates upon which Weir paid for meals for Commissioners Hanson and Adams occurred during the time docket 600 was pending before the Commission. The evidence is more than sufficient to sustain the Commission's inference that Northwestern Bell's actions were intended to influence the commission and therefore constituted a fraud on the commission.

Id. The court further found that the record supported the conclusion that the improper contacts actually affected the commission's final rate decision. The court quoted the following statement from

a similar case involving a different utility, In re Northern States Power Co., 414 N.W.2d 383, 386-87 (Minn. 1987):

> While the record contains no direct evidence that Adams unduly influenced the decision, his mere presence creates the obvious appearance of impropriety and undermines the public confidence in the system. We are incredulous that these sophisticated governmental and utility officials could have assumed otherwise. We therefore hold that there is substantial evidentiary support for the findings of the Commission that the individuals had a duty to disclose their association, that Adams had a substantial conflict of interest, and that the proceedings were tainted as a result.

417 N.W.2d at 283. The court further noted that at the time of Northwestern Bell's initial request for a rate increase the administrative law judge (ALJ), who had been uninfluenced by the ex parte communications, recommended only a $36.1 million rate increase, while the allegedly tainted commission voted to grant a rate increase in the amount of $57,511,000. "This discrepancy," according to the court, "provides further support for the Commission's subsequent determination that the proceedings in docket 600 were tainted by the ex parte contacts." Id. at 283.

The results of the MPUC's redeliberation were issued by orders dated April 3, 1987 and April 4, 1987. See Defendants' Memorandum in Support of Motion for Reconsideration and Reinstatement of Judgment, Exh. A, D. In its April 3, 1987 order, the commission discussed the appropriate remedy for the improper contacts. It decided not to retroactively dismiss the rate increase application in its entirety, as had been requested by the Minnesota Public Interest Research Group (MPIRG). Rather, the commission ordered the matter redeliberated. Following redeliberation, the commission determined that Northwestern Bell had "overcharged

its customers since interim rates were put into effect on November 28, 1983," and that "overcharges should be refunded to ratepayers." In the Matter of the Application of Northwestern Bell Telephone Co., Order After Redeliberation dated April 3, 1987 at 137, Defendants' Memorandum in Support of Motion for Reconsideration and Reinstatement of Judgment, Exh. B at 137. The commission concluded, however, that it lacked authority to order refunds, pursuant to the Minnesota Supreme Court's decision in In re Peoples Natural Gas Co., 369 N.W.2d 530 (Minn. 1985). The commission recognized that the court had authorized the Attorney General to pursue such refunds under Minn. Stat. § 216B.54. See State by Spannaus v. Northwestern Bell Telephone Co., 304 N.W.2d 872 (Minn. 1981). Accordingly, the commission ordered prospective rate decreases but requested the Attorney General to pursue the remedy of refunds for past overcharging.

In response to MPUC's request, the State of Minnesota brought suit against Northwestern Bell in Hennepin County District Court to collect refund amounts in accordance with the 1987 MPUC reconsideration. State of Minnesota v. Northwestern Bell Telephone Co., CIVIL C8-87-487340 (Ramsey County District Court). That case was settled by the parties on September 28, 1989 and provided for a refund of $31,900,000 plus interest and applicable taxes. Settlement Agreement at Defendants' Exh. C. This figure was determined based on the difference between the tariffs originally approved by the MPUC and those determined after reconsideration in the 1987 orders.

Plaintiffs argue that because the MPUC has reconsidered the rates allegedly tainted by defendants' improper contacts and determined the amount of overcharging caused thereby, there is no reason for the Court to abstain. The Court disagrees. The purposes underlying the abstention and clear statement doctrines go

beyond the avoidance of judicial rate-making. At their core, these doctrines are concerned with preservation of the federal balance, and deference to the legitimate police powers of the states. Colorado River Water Conservation District v. United States, 424 U.S. 800, 814 (1976) (abstention appropriate where "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern"); United States v. Bass, 404 U.S. 336, 349 (1971) (statutes not construed to alter federal-state balance unless intent to do so "clearly stated"). Here, an award of treble damages against a regulated public utility such as Northwestern Bell adds a severe sanction for the conduct in question for which the defendants would not otherwise be liable under state laws governing rate making. There is no indication that in redetermining suitable rates for Northwestern Bell the MPUC considered the possibility of an award of treble damages against the company under RICO for overcharging. The availability of such a remedy could well impact the manner in which a regulatory body such as the MPUC conducts rate making procedures and investigates and amends its decisions when it finds that errors may have been made in rate-setting determinations.

In plaintiffs' parallel state court action, H.J., Inc., 420 N.W.2d 673 (Minn.Ct.App. 1988), the Minnesota Court of Appeals held that plaintiffs' state law unjust enrichment claims constituted a collateral attack on the MPUC's rate making decisions in violation of Minn. Stat. 237.26 which provides:

> If no appeal is taken from any order of the department . . . then in all litigation thereafter arising between . . . private parties and any telephone company, the order shall be deemed final and conclusive.

The court rejected the argument that plaintiffs' claim was not a collateral attack on a rate order because it merely sought to declare the rates void and not to reset rates. The court held that the statute does not distinguish between collateral attacks based on the reasonableness of rates and collateral attacks based on the validity of the rate proceeding, and concluded that plaintiffs' claim "would still be a collateral attack on a rate order in violation of Minn. Stat. § 237.26." 420 N.W.2d at 676. This decision was reached almost a year after the MPUC reconsideration order. Thus the court was presumably aware that the MPUC had itself reconsidered the rates when it held that plaintiffs' claims constituted a collateral attack on the original rates. It is apparent, therefore, that Minn. Stat. § 237.26, as interpreted by the Minnesota Court of Appeals, supports the view that plaintiffs' RICO claims, like their unjust enrichment claims, constitute a collateral attack on state rate-making determinations and should be barred.

In Long Island Lighting, the court held that abstention was appropriate regarding RICO claims challenging electric rates determined by the New York Public Service Commission:

> Exercise of RICO jurisdiction in this case "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern" . . . . State regulation of utilities is a matter of "substantial public concern."

Long Island Lighting, 710 F. Supp. at 1398, quoting Colorado River Water Conservation District v. United States, 424 U.S. 800, 814 (1976) (describing circumstances under which abstention is appropriate). As the Supreme Court held in Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 103 S.Ct. 1905, 1908 (1983), "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."

In Long Island Lighting, the court also relied upon the doctrine of "clear statement," pursuant to which legislation will not be interpreted to alter the federal-state balance absent a "clear statement that Congress intended to exercise its . . . power in full." 710 F.Supp. at 1400, citing L.H. Tribe, American Constitutional Law 316 (2d ed. 1988). For example, in construing the federal mail fraud statute not to reach schemes to defraud people of intangible rights to honest government, the United States Supreme Court recently held:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the federal government in setting standards of disclosure and good government for local and state officials, we read section 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

McNally v. United States, 107 S.Ct. 2875, 2881 (1987). In United States v. Bass, 404 U.S. 336 (1971), in construing the Omnibus Crime Control and Safe Streets Act to require a nexus with interstate commerce, the Court held:

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal state balance . . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. at 349.

In light of these principles, the court in Long Island Lighting declined to construe RICO to reach claims against state regulated utilities.

> [T]o apply (RICO) to the facts of the present case would . . . lead to . . . the intrusion of federal authority into an area historically reserved to state control. In such a situation the "clear statement" doctrine and the federalism concerns that underlie it are properly invoked.

Long Island Lighting, 710 F. Supp. at 1403.

The court in Carr echoed this conclusion:

> [P]laintiffs contend that the expanded jurisdiction of the federal civil RICO statute enables this court to make reparations for the alleged commission of fraud in the instant case. . . . I cannot find that the RICO statute authorizes such a drastic intervention into a state's authority to regulate public utilities.

Carr, 1990 WESTLAW 21043.[2]

As discussed above, this case treads heavily in an area of fundamental state concern, public utility regulation. The MPUC

---

[2] Plaintiffs rely on Clipper Exxpress v. Rocky Mountain Motor Tariff, 690 F.2d 1240 (9th Cir. 1982), cert. denied, 103 S.Ct. 1234 (1985) in which the United States Court of Appeals for the Ninth Circuit held that a freight forwarder regulated by the Interstate Commerce Commission may bring a claim for damages against trucking companies and a rate bureau for alleged antitrust violations, in which plaintiff claimed that defendants' actions delayed plaintiff's filing of a rate for two years, a rate which the ICC ultimately approved. The Court concluded that the Keogh doctrine was not violated because relief would do nothing to disturb ICC approved rates, and would not involve speculation about what rates the ICC would have approved but for defendants' conduct, the primary issue in Keogh. In the court's view, however, this case is distinguishable in that the Sherman Act is a specific legislative attempt to discourage and eliminate restraints of trade, while RICO lacks the same clear focus. In light of what the Court perceives as a serious disruption of state regulatory policy, the Court declines to find that RICO was intended to apply to the claims at issue in this case.

employed its administrative expertise and procedural decision-making apparatus to uncover the wrongdoing on the part of Northwestern Bell. This administrative action resulted in both rate adjustments, and an agreement refunding to Northwestern Bell customers $31.9 million plus interest and applicable taxes. For the reasons discussed above, the Court is satisfied that Congress did not intend that the additional sanction of treble damages should be available against defendants under RICO for the actions alleged in plaintiffs' complaint. Accordingly, defendants' motion to dismiss plaintiffs' RICO claims will be granted.[3]

II. Whether Count I of Plaintiffs' Complaint Alleging Pendent State Law Claims Should be Dismissed

Count I of plaintiffs' complaint alleges that defendant violated the Minnesota bribery statute, Minn. Stat. § 609.42, as well as Minnesota common law, and seek damages on account of these violations. In 1986 the Court declined to exercise jurisdic-

---

[3] In light of the Court's disposition of this case, the Court need not reach the numerous issues of RICO construction raised by defendants in support of their motion to dismiss. Nor need the Court address the important and intriguing question of the constitutionality of RICO. See H.J., Inc., 109 S.Ct. at 2909 (Scalia, J., concurring).

The Court does note, however, what appears to be a significant development among the United States courts of appeals regarding the person-enterprise distinction under 18 U.S.C. § 1962(a). In 1986 the Court held that plaintiff must allege "person" distinct from the RICO "enterprise" under section 1962(a). Since that time several circuits have held otherwise. See Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1397 (9th Cir. 1986); Garbade v. Great Divide Mining, 831 F.2d 212, 213 (10th Cir. 1987); Yellow Bus Lines, Inc. v. Local Union 639, 839 F.2d 782, 790 (D.C.Cir. 1988), vacated on other grounds, 109 S.Ct. 3235 (1989); Official Publications, Inc. v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989). The Fourth Circuit has reversed its previous position. See Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990).

tion over these claims in light of its dismissal of plaintiffs' RICO claims. H.J., Inc., 648 F.Supp. at 429-30. Defendants now seek dismissal with prejudice in light of the Minnesota Court of Appeals' rejection of such claims in plaintiffs' concurrent state court action. Plaintiffs seek severance of such claims, and argues that the Court need not reach this issue unless the federal claims are dismissed.

In H.J., Inc. v. Northwestern Bell Telephone Co., 420 N.W.2d 673 (Minn.Ct.App. 1988), the Minnesota Court of Appeals sustained the trial court's dismissal of plaintiffs' concurrent state court suit. The court held that neither the Minnesota bribery statute nor Minnesota common law provided a private cause of action for damages. Defendants argue that this judgment precludes further litigation of this issue by plaintiffs in this Court. Defendants are correct. The final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been tried in that action. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). These claims will therefore be dismissed on the merits. Dismissal of plaintiffs' state law claims on the merits renders moot plaintiffs' motion for severance or for separate trial.

Accordingly, based on all the files, records and proceedings herein,

IT IS ORDERED that

1. defendants' motion to dismiss plaintiffs' RICO claims is granted;

2. defendants' motion to dismiss plaintiffs' state law claims is granted; and

3. plaintiffs' complaint is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Judge Harry H. MacLaughlin
United States District Court

DATED: April 4, 1990

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-5121

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Issac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,	*	
Appellants,	*	ORDER OF REMAND
v.	*	
Northwestern Bell Telephone Company, a subsidiary of U. S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed coconspirators,	*	
Appellees.	*	

Filed: October 30, 1989

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge,and JOHN R. GIBSON, Circuit Judge.

PER CURIAM.

This cause is before us on remand from the Supreme Court following its opinion in H. J. Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893 (1989), reversing our decision pursuant to opinion in H. J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1987). The order of remand directs further proceedings in conformity with the opinion of the Supreme Court.

By correspondence counsel for the respective parties have reminded us that there are, and were, appellate issues other than the principal RICO matter, 18 U.S.C. § § 1961-68, which resulted in reversal by the Supreme Court. We are invited to consider and decide those issues.

We decline the invitation. Those issues, notably dismissal of certain pendent state claims, and relatedly questions concerning collateral attack on rate orders by state regulatory bodies, were decided by the district court in light of that court's decision on the civil RICO claims. We observe that on remand the district court will be considering, and indeed possibly reconsidering, its rulings in context of the Supreme Court's opinion. Thus, it is entirely likely that some of the issues originally before both the district court and this court will not survive further proceedings. To say the least, their pursuance will be in different context.

Accordingly, it is considered, ordered and adjudged that the judgment of the district court dismissing the complaint for failure to state a claim is vacated and the cause is remanded for further

proceedings in light of the opinion of the Supreme Court in H. J. Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893 (1989).

Upon remand the district court is at liberty to consider or reconsider such of its related and interdependent rulings as are, or may appear to be, appropriate.

A true copy.

Attest: s/

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.
MANDATE ISSUED: 5/7/90

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. *See United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES
Syllabus

H. J. INC. ET AL. *v.* NORTHWESTERN BELL TELEPHONE CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-1252. Argued November 8,1988-Decided June 26, 1989

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, which is Title IX of the Organized Crime Control Act of 1970 (OCCA), imposes criminal and civil liability upon persons who engage in certain "prohibited activities," each of which is defined to include, as a necessary element, proof of a "pattern of racketeering activity." § 1962. "Racketeering activity" means "any act or threat involving" specified state-law crimes, any "act" indictable under specified

federal statutes, and certain federal "offenses." § 1961(1). A "pattern" requires "at least two acts of racketeering activity" within a 10-year period. § 1961(5). Petitioners, customers of respondent Northwestern Bell, filed a civil action in the District Court against Northwestern Bell and other respondents, including members of the Minnesota Public Utilities Commission (MPUC)--which is responsible for determining Northwestern Bell's rates--seeking an injunction and treble damages. They raised four separate claims under §§ 1962(a), (b), (c), and (d), based on factual allegations that between 1980 and 1986, Northwestern Bell made various cash and in-kind payments to MPUC members, and thereby influenced them to approve rates for the company in excess of a fair and reasonable amount. The District Court dismissed the complaint, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted, on the ground that each of the fraudulent acts alleged was "committed in furtherance of a single scheme to influence MPUC commissioners" rather than multiple illegal schemes. The Court of Appeals affirmed, confirming that under its precedent, a single scheme is insufficient to establish a pattern of racketeering activity.

Syllabus

Held:

1. In order to prove a pattern of racketeering activity, a plaintiff or prosecutor must show at least two racketeering predicates that are related *and* that amount to, or threaten the likelihood of, continued criminal activity. Proof of neither relationship nor continuity requires a showing that the racketeering predicates were committed in furtherance of

multiple criminal schemes. Pp. 5-18.

(a) Section 1961(5) states that at least two racketeering predicates committed within a ten-year period are necessary to establish a RICO pattern, but implies that two acts may not be sufficient. Section 1961(5) thus assumes that there is something to a pattern beyond merely the number of predicates involved. In normal usage, the word "pattern" would also be taken to require not simply a multiplicity of predicates, but rather predicates arranged or ordered by reason of the relationship they bear to each other or to some external organizing principle. The text of RICO fails to identify the forms of relationship or external principles to be used to determine whether predicates fall into a pattern. RICO's legislative history, however, establishes that Congress intended that to prove a "pattern of racketeering activity" a plaintiff or prosecutor show both "relationship" and "continuity" -- that the racketeering predicates are related, and that they either constitute or threaten long-term criminal activity. Pp. 6-8.

(b) Relationship and continuity are two distinct requirements, though their proof will often overlap. RICO's notion of relationship is no more constrained than that used in Title X of OCCA, under which "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U. S. C. § 3575(e). Continuity of racketeering activity likewise may be demonstrated in a variety of ways. Continuity is centrally a temporal concept, and may be either closed- or open-ended. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates

extending over a substantial period of time. Otherwise, it must be shown that the predicates establish a *threat* of long-term racketeering activity--for example, because the predicates themselves involve a distinct threat of such activity; because they are part of the regular way of doing business for an ongoing entity such as a criminal association or legitimate business; or because they are a regular means of conducting or participating in an ongoing RICO enterprise. Although proof of multiple criminal schemes may be relevant to this inquiry into continuity, it is not the only way to show continuity. Adopting the Court of Appeals' multiple-scheme test would bring a rigidity to the methods of proving a pattern not present in the idea of "continuity" itself, and it would introduce a concept--the "scheme"--that does not appear in RICO's language or legislative history. Pp. 8-12.

(c) Neither RICO's language nor its legislative history supports a rule that a defendant's racketeering activities form a pattern only if they are characteristic of organized crime. No such restriction appears in RICO's text. Nor is there any language suggesting that RICO's scope should be limited to acts of an association rather than an individual acting alone. Moreover, Congress' approach in RICO can be contrasted with its decision to enact explicit limitations to organized crime in other statutes. *E. g.*, Omnibus Crime Control and Safe Streets Act of 1968, § 601(b). The argument that RICO's broad language should be read restrictively to be congruous with RICO's purpose to eradicate organized crime is rejected: the legislative history shows Congress had no such restriction in mind. Pp. 12-18.

2. The Court of Appeals erred in affirming the District Court's dismissal of petitioners' complaint for failure to allege

facts sufficient to demonstrate a "pattern of racketeering activity." Consistent with the allegations in their complaint, petitioners may be able to prove that the multiple predicates alleged satisfy the requirements of continuity and relationship and hence satisfy RICO's pattern of racketeering element. Pp. 18-19.

829 F. 2d 648, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 87-1252

H. J. INC., ET AL., ETC., PETITIONERS *v.* NORTHWESTERN BELL TELEPHONE COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 1989]

JUSTICE BRENNAN delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO or the Act), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§1961-1968 (1982 ed. and Supp. V), imposes criminal and civil liability upon those who engage in certain "prohibited activities." Each prohibited activity is defined in 18 U. S. C. § 1962 to include, as one necessary element, proof either of "a pattern of racketeering activity" or of "collection of an unlawful debt." "Racketeering activity" is defined in RICO to mean

"any act or threat involving" specified state-law crimes, any "act" indictable under various specified federal statutes, and certain federal "offenses," 18 U. S. C. § 1961(1) (1982 ed., Supp. V); but of the term "pattern" the statute says only that it "requires at least two acts of racketeering activity" within a 10-year period, § 1961(5). We are called upon in this civil case to consider what conduct meets RICO's pattern requirement.

I

RICO renders criminally and civilly liable "any person" who uses or invests income derived "from a pattern of racketeering activity" to acquire an interest in or to operate an enterprise engaged in interstate commerce, § 1962(a); who acquires or maintains an interest in or control of such an enterprise "through a pattern of racketeering activity," § 1962(b); who, being employed by or associated with such an enterprise, conducts or participates in the conduct of its affairs "through a pattern of racketeering activity," § 1962(c); or, finally, who conspires to violate the first three subsections of § 1962, § 1962(d). RICO provides for drastic remedies: conviction for a violation of RICO carries severe criminal penalties and forfeiture of illegal proceeds, 18 U. S. C. § 1963 (1982 ed., Supp. V); and a person found in a private civil action to have violated RICO is liable for treble damages, costs, and attorney's fees, § 1964(c).

Petitioners, customers of respondent Northwestern Bell Telephone Co., filed this putative class action in 1986 in the District Court for the District of Minnesota. Petitioners alleged violations of 18 U. S. C. §§1962(a), (b), (c), and (d) by Northwestern Bell and the other respondents--some of the telephone company's officers and employees, various members of the Minnesota Public Utilities Commission (MPUC), and other

unnamed individuals and corporations--and sought an injunction and treble damages under RICO's civil liability provisions, §§1964(a) and (c).

The MPUC is the state body responsible for determining the rates that Northwestern Bell may charge. Petitioners' 5-count complaint alleged that between 1980 and 1986 Northwestern Bell sought to influence members of the MPUC in the performance of their duties--and in fact caused them to approve rates for the company in excess of a fair and reasonable amount--by making cash payments to commissioners, negotiating with them regarding future employment, and paying for parties and meals, for tickets to sporting events and the like, and for airline tickets. Based upon these factual allegations, petitioners alleged in their first count a pendent state-law claim, asserting that Northwestern Bell violated the Minnesota bribery statute, Minn. Stat. § 609.42 (1988), as well as state common law prohibiting bribery. They also raised four separate claims under § 1962 of RICO. Count II alleged that, in violation of § 1962(a), Northwestern Bell derived income from a pattern of racketeering activity involving predicate acts of bribery and used this income to engage in its business as an interstate "enterprise." Count III claimed a violation of § 1962(b), in that, through this same pattern of racketeering activity, respondents acquired an interest in or control of the MPUC, which was also an interstate "enterprise." In Count IV, petitioners asserted that respondents participated in the conduct and affairs of the MPUC through this pattern of racketeering activity, contrary to § 1962(c). Finally, Count V alleged that respondents conspired together to violate §§ 1962(a), (b), and (c), thereby contravening § 1962(d).

The District Court granted respondents' Federal Rule of Civil Procedure 12(b)(6) motion, dismissing the complaint for failure to state a claim upon which relief could be granted. 648 F. Supp. 419

(Minn. 1986). The Court found that "[e]ach of the fraudulent acts alleged by [petitioners] was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers." *Id.*, at 425. It held that dismissal was therefore mandated by the Court of Appeals for the Eighth Circuit's decision in *Superior Oil Co. v. Fulmer*, 785 F. 2d 252 (1986), which the District Court interpreted as adopting an "extremely restrictive" test for a pattern of racketeering activity that required proof of "multiple illegal schemes." 648 F. Supp., at 425.[1] The Court of Appeals for the Eighth Circuit affirmed the dismissal of petitioners' complaint, confirming that under Eighth Circuit precedent "[a] single fraudulent effort or scheme is insufficient" to establish a pattern of racketeering activity, 829 F. 2d 648, 650 (1987), and agreeing with the District Court that petitioners' complaint alleged only a single scheme, *ibid.* Two members of the panel suggested in separate concurrences, however, that the Court of Appeals should reconsider its test for a RICO pattern. *Id.*, at 650 (McMillian, J.); *id.*, at 651 (John R. Gibson, J.). Most Courts of Appeals have rejected the Eighth Circuit's interpretation of RICO's pattern concept to require an allegation

---

[1] The District Court also held that, because the MPUC had conclusively determined that Northwestern Bell's allegedly excessive rates were reasonable, the "filed rate" doctrine provided an independent ground for dismissal of the complaint. 648 F. Supp., at 428-429. The Court of Appeals did not consider this issue, and we have no occasion to address it here. Nor do we express any opinion as to the District Court's view that Count II was defective because it failed to "allege the existence of an 'enterprise' separate and distinct from the 'person' identified," as the court held was required by § 1962(a). *Id.*, at 428.

and proof of multiple schemes,[2] and we granted certiorari to resolve this conflict. 485 U. S. 958 (1988). We now reverse.

II

In *Sedima, S. P. R. L. v. Imrex Co.*, 473 U. S. 479 (1985), this Court rejected a restrictive interpretation of § 1964(c) that would have made it a condition for maintaining a civil RICO action both that the defendant had already been convicted of a predicate racketeering act or of a RICO violation, and that plaintiff show a special racketeering injury. In doing so, we acknowledged concern in some quarters over civil RICO's use against "legitimate"

---

[2] See *Roeder v. Alpha Industries, Inc.*, 814 F. 2d 22, 30-31 (CA1 1987) (rejecting multiple scheme requirement; sufficient that predicates relate to one another and threaten to be more than an isolated occurrence); *United States v. Indelicato*, 865 F. 2d 1370, 1381-1384 (CA2 1989) (en banc) (rejecting multiple scheme requirement; two or more interrelated acts with showing of continuity or threat of continuity sufficient); *Barticheck v. Fidelity Union Bank/First National State*, 832 F. 2d 36, 39-40 (CA3 1987) (rejecting multiple scheme requirement; adopting case-by-case multifactor test); *International Data Bank, Ltd. v. Zepkin*, 812 F. 2d 149, 154-155 (CA4 1987) (rejecting any mechanical test; single *limited* scheme insufficient, but a large continuous scheme should not escape RICO's enhanced penalties); *R. A. G. S. Couture, Inc. v. Hyatt*, 774 F. 2d 1350, 1355 (CA5 1985) (two related predicate acts may be sufficient); *United States v. Jennings*, 842 F. 2d 159, 163 (CA6 1988) (two predicate acts potentially enough); *Morgan v. Bank of Waukegan*, 804 F. 2d 970, 975-976 (CA7 1986) (refusing to accept multiple scheme requirement as the general rule; adopting multifactor test, but requiring that predicates constitute "separate transactions"); *Sun Savings and Loan Assn. v. Dierdorff*, 825 F. 2d 187, 193 (CA9 1987) (rejecting multiple scheme test; requiring two predicates, separated in time, which are not isolated events); *Torwest DBC, Inc. v. Dick*, 810 F. 2d 925, 928-929 (CA10 1987) (holding single scheme from which no threat of continuing criminal activity may be inferred insufficient); *Bank of America National Trust & Savings Assn. v. Touche Ross & Co.*, 782 F. 2d 966, 971 (CA11 1986) (rejecting multiple scheme test; requiring that predicates be interrelated and not isolated events); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 268 U. S. App. D. C. 103, 110, 839 F. 2d 782, 789 (1988) (requiring related acts that are not isolated events).

businesses, as well as "mobsters and organized criminals"--a concern that had frankly led to the Court of Appeals' interpretation of § 1964(c) in *Sedima*, see *id.*, at 499-500. But we suggested that RICO's expansive uses "appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern' "--both factors that apply to criminal as well as civil applications of the Act. *Id.*, at 500; see also *id.*, at 501-502 (MARSHALL, J., dissenting). Congress has done nothing in the interim further to illuminate RICO's key requirement of a pattern of racketeering; and as the plethora of different views expressed by the Courts of Appeals since *Sedima* demonstrates, see n. 2, *supra*, developing a meaningful concept of "pattern" within the existing statutory framework has proved to be no easy task.

It is, nevertheless, a task we must undertake in order to decide this case. Our guides in the endeavor must be the text of the statute and its legislative history. We find no support in those sources for the proposition, espoused by the Court of Appeals for the Eighth Circuit in this case, that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes. Nor can we agree with those courts that have suggested that a pattern is established merely by proving two predicate acts, see, *e.g.*, *United States v. Jennings*, 842 F. 2d 159, 163 (CA6 1988), or with *amici* in this case who argue that the word "pattern" refers only to predicates that are indicative of a perpetrator involved in organized crime or its functional equivalent. In our view, Congress had a more natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass

multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.

A

We begin, of course, with RICO's text, in which Congress followed a "pattern [of] utilizing terms and concepts of breadth." *Russello v. United States*, 464 U. S. 16, 21 (1983). As we remarked in *Sedima, supra*, at 496, n. 14, the section of the statute headed "definitions," 18 U. S. C. § 1961, does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern. Unlike other provisions in § 1961 that tell us what various concepts used in the Act "mean," § 1961(5) says of the phrase "pattern of racketeering activity" only that it "requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." It thus places an outer limit on the concept of a pattern of racketeering activity that is broad indeed.

Section 1961(5) does indicate that Congress envisioned circumstances in which no more than two predicates would be necessary to establish a pattern of racketeering--otherwise it would have drawn a narrower boundary to RICO liability, requiring proof of a greater number of predicates. But, at the same time, the statement that a pattern "requires at least" two predicates implies "that while two acts are necessary, they may not be sufficient." *Sedima, supra*, at 496, n. 14; *id.*, at 527 (Powell, J., dissenting). Section 1961(5) concerns only the minimum *number* of predicates necessary to establish a pattern; and it assumes that there is something to a RICO pattern *beyond* simply the number of

predicate acts involved. The legislative history bears out this interpretation, for the principal sponsor of the Senate bill expressly indicated that "proof of two acts of racketeering activity, without more, does not establish a pattern." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). Section § 1961(5) does not identify, though, these additional prerequisites for establishing the existence of a RICO pattern.

In addition to § 1961(5), there is the key phrase "pattern of racketeering activity" itself, from § 1962, and we must "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U. S. 1, 9 (1962). In normal usage, the word "pattern" here would be taken to require more than just a multiplicity of racketeering predicates. A "pattern" is an "arrangement or order of things or activity," 11 Oxford English Dictionary 357 (2d ed. 1989), and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged." The text of RICO conspicuously fails anywhere to identify, however, forms of relationship or external principles to be used in determining whether racketeering activity falls into a pattern for purposes of the Act.

It is reasonable to infer, from this absence of any textual identification of sorts of pattern that would satisfy § 1962's requirement, in combination with the very relaxed limits to the pattern concept fixed in § 1961(5), that Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set. For any more specific guidance as to the meaning of

"pattern," we must look past the text to RICO's legislative history, as we have done in prior cases construing the Act. See *Sedima, S. P. R. L. v. Imrex Co., supra*, at 486-490 (Court opinion), 510-519 (MARSHALL, J., dissenting), 524-527 (Powell, J., dissenting); *Russello v. United States*, 464 U. S. 16, 26-29 (1983); *United States v. Turkette*, 452 U. S. 576, 586-587, 589-593 (1981).

The legislative history, which we discussed in *Sedima, supra*, at 496, n. 14, shows that Congress indeed had a fairly flexible concept of a pattern in mind. A pattern is not formed by "sporadic activity," S. Rep. No. 91-617, p. 158 (1969), and a person cannot "be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses," 116 Cong. Rec. 18940 (1970) (Sen. McClellan). Instead, "[t]he term 'pattern' itself requires the showing of a relationship" between the predicates, *ibid.*, and of "'the threat of continuing activity,'" *ibid.*, quoting S. Rep. No. 91-617, at 158. "It is this factor of *continuity plus relationship* which combines to produce a pattern." *Ibid.* (emphasis added). RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.

B

For analytic purposes these two constituents of RICO's pattern requirement must be stated separately, though in practice their proof will often overlap. The element of relatedness is the easier to define, for we may take guidance from a provision elsewhere in the Organized Crime Control Act of 1970 (OOCA), Pub. L. 91-452, 84 Stat. 922, of which RICO formed Title IX. OCCA included as Title X the Dangerous Special Offender Sentencing

Act, 18 U. S. C. § 3575 *et seq.* (now partially repealed). Title X provided for enhanced sentences where, among other things, the defendant had committed a prior felony as part of a pattern of criminal conduct or in furtherance of a conspiracy to engage in a pattern of criminal conduct. As we noted in *Sedima*, 473 U. S. at 496, n. 14, Congress defined Title X's pattern requirement solely in terms of the *relationship* of the defendant's criminal acts one to another: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U. S. C. § 3575(e). We have no reason to suppose that Congress had in mind for RICO's pattern of racketeering component any more constrained a notion of the relationships between predicates that would suffice.

RICO's legislative history tells us, however, that the relatedness of racketeering activities is not alone enough to satisfy § 1962's pattern element. To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity. As to this continuity requirement, § 3575(e) is of no assistance. It is this aspect of RICO's pattern element that has spawned the "multiple scheme" test adopted by some lower courts, including the Court of Appeals in this case. See 829 F. 2d, at 650 ("In order to demonstrate the necessary continuity appellants must allege that Northwestern Bell 'had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities.' . . . A single fraudulent effort or scheme is insufficient"). But although proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity, it is implausible

to suppose that Congress thought continuity might be shown *only* by proof of multiple schemes. The Eighth Circuit's test brings a rigidity to the available methods of proving a pattern that simply is not present in the idea of "continuity" itself; and it does so, moreover, by introducing a concept--the "scheme"--that appears nowhere in the language or legislative history of the Act.[3] We adopt a less inflexible approach that seems to us to derive from a common-sense, everyday understanding of RICO's language and Congress' gloss on it. What a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, *simpliciter*. This may be done in a variety of ways, thus making it difficult to formulate in the abstract any general test for continuity. We can, however, begin to delineate the requirement.

"Continuity" is both a closed--and open-ended concept, referring either to a closed period of repeated conduct, or to past

---

[3] Nor does the multiple-scheme approach to identifying continuing criminal conduct have the advantage of lessening the uncertainty inherent in RICO's pattern component, for "scheme" is hardly a self-defining term." *Barticheck v. Fidelity Union Bank/First National State*, 832 F. 2d, at 39. A "scheme" is in the eye of the beholder, since whether a scheme exists depends on the level of generality at which criminal activity is viewed. For example, petitioners' allegation that Northwestern Bell attempted to subvert public utility commissioners who would be voting on the company's rates might be described as a single scheme to obtain a favorable rate, or as multiple schemes to obtain favorable votes from individual commissioners on the ratemaking decision. Similarly, though interference with ratemaking spanning several ratemaking decisions might be thought of as a single scheme with advantageous rates as its objective, each ratemaking decision might equally plausibly be regarded as distinct and the object of its own "scheme." There is no obviously "correct" level of generality for courts to use in describing the criminal activity alleged in RICO litigation. Because of this problem of generalizability, the Eighth Circuit's "scheme" concept is highly elastic. Though the definitional problems that arise in interpreting RICO's pattern requirement inevitably lead to uncertainty regarding the statute's scope--whatever approach is adopted--we prefer to confront these problems directly, not "by introducing a new and perhaps more amorphous concept into the analysis" that has no basis in text or legislative history. *Ibid.*

conduct that by its nature projects into the future with a threat of repetition. See *Barticheck v. Fidelity Union Bank/First National State*, 832 F. 2d 36, 39 (CA3 1987). It is, in either case, centrally a temporal concept--and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated. See S. Rep. No. 91-617, at 158.

Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the field of possibilities--preferring to deal with this issue in the context of concrete factual situations presented for decision--we offer some examples of how this element might be satisfied. A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the

future, and thus supply the requisite threat of continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."[4]

The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.

III

Various *amici* urge that RICO's pattern element should be interpreted more narrowly than as requiring relationship and

---

[4] Insofar as the concurrence seems to suggest, *post*, at-----, that very short periods of criminal activity that do *not* in any way carry a threat of continued criminal activity constitute "obvious racketeer[ing]" to which Congress intended RICO, with its enhanced penalties, to apply, we have concluded that it is mistaken, and that when Congress said predicates must demonstrate "continuity" before they may form a RICO pattern, it expressed an intent that RICO reach activities that amount to or threaten long-term criminal activity.

continuity in the senses outlined above, so that a defendant's racketeering activities form a pattern only if they are characteristic either of organized crime in the traditional sense, or of an organized-crime-type perpetrator, that is, of an association dedicated to the repeated commission of criminal offenses.[5] Like the Court of Appeals' multiple scheme rule, however, the argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text, and is at odds with the tenor of its legislative history.

One evident textual problem with the suggestion that predicates form a RICO pattern only if they are indicative of an organized crime perpetrator--in either a traditional or functional sense--is that it would seem to require proof that the racketeering acts were the work of an association or group, rather than of an individual acting alone. RICO's language supplies no grounds to believe that Congress meant to impose such a limit on the Act's scope. A second indication from the text that Congress intended no organized crime limitation is that no such restriction is explicitly stated. In those titles' of OCCA where Congress did

---

[5] See Brief for the Washington Legal Foundation as *Amicus Curiae* 11, 15-16; Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 17. See also Briefs for the National Association of Manufacturers, and for the American Institute of Certified Public Accountants as *Amici Curiae*.

Lower courts have rejected various forms of the argument that RICO should be limited in scope, through one or another of its terms or concepts, to organized crime. See *e. g., Sedima, S. P. R. L. v. Imrex Co.*, 741 F. 2d 482, 492, n. 32 (CA2 1984) (citing cases), rev'd, 473 U. S. 479 (1985); *Moss v. Morgan Stanley Inc.*, 719 F. 2d 5, 21 (CA2 1983) ("The language of the statute . . . does not premise a RICO violation on proof or allegations of any connection with organized crime"), cert. denied *sub nom. Moss v. Newman*, 465 U. S. 1025 (1984); *Schacht v. Brown*, 711 F. 2d 1343, 1353-1356 (CA7 1983).

intend to limit the new law's application to the context of organized crime, it said so. Thus Title V, authorizing the witness protection program, stated that the Attorney General may provide for the security of witnesses "in legal proceedings against any person alleged to have participated in an organized criminal activity." 84 Stat. 933, note preceding 18 U. S. C. § 3481 (since repealed). And Title VI permitted the deposition of a witness to preserve testimony for a legal proceeding, upon motion by the Attorney General certifying that "the legal proceeding is against a person who is believed to have participated in an organized criminal activity." 18 U. S. C. § 3503(a). Moreover, Congress' approach in RICO can be contrasted with its decision to enact explicit limitations to organized crime in other statutes. *E. g.*, Omnibus Crime Control and Safe Streets Act of 1968, § 601(b), Pub. L. 90-351, 82 Stat. 209 (defining "organized crime" as "the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations"). Congress' decision not explicitly to limit RICO's broad terms strongly implies that Congress had in mind no such narrow and fixed idea of what constitutes a pattern as that suggested by *amici* here.

It is argued, nonetheless, that Congress' purpose in enacting RICO, as revealed in the Act's title, in OCCA's preamble, 84 Stat. 923 (Congress seeking "the eradication of organized crime in the United States"), and in the legislative history, was to combat organized crime; and that RICO's broad language should be read narrowly so that the Act's scope is coextensive with this purpose. We cannot accept this argument for a narrowing construction of the Act's expansive terms.

To be sure, Congress focused on, and the examples used in the debates and reports to illustrate the Act's operation concern, the predations of mobsters. Organized crime was without a doubt Congress' major target, as we have recognized elsewhere. See *Russello*, 464 U. S., at 26; *Turkette*, 452 U. S., at 591. But the definition of a "pattern of criminal conduct" in Title X of OCCA in terms only of the relationship between criminal acts, *see supra*, at -----, shows that Congress was quite capable of conceiving of "pattern" as a flexible concept not dependent on tying predicates to the major objective of the law, which for Title X as for Title IX was the eradication of organized crime. See 84 Stat. 923. Title X's definition of pattern should thus create a good deal of skepticism about any claim that, despite the capacious language it used, Congress must have intended the RICO pattern element to pick out only racketeering activities with an organized crime nexus. And, indeed, the legislative history shows that Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime.

Opponents criticized OCCA precisely because it failed to limit the statute's reach to organized crime. See, *e. g.*, S. Rep. No. 91-617, at 215 (Sens. Hart and Kennedy complaining that the Organized Crime Control bill "goes beyond organized criminal activity"). In response, the statute's sponsors made evident that the Omission of this limit was no accident, but a reflection of OCCA's intended breadth. Senator McClellan was most plain in this respect:

> "The danger posed by organized crime-type offenses to our society has, of course, provided the occasion for our examination of the working of our system of criminal justice. But should it follow . . . that any proposals for action stemming from that examination be limited to organized

crime?

"[T]his line of analysis . . . is seriously defective in several regards. Initially, it confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that reexamination.

. . . . .

"In addition, the objection confuses the role of the Congress with the role of a court. Out of a proper sense of their limited lawmaking function, courts ought to confine their judgments to the facts of the cases before them. But the Congress in fulfilling its proper legislative role must examine not only individual instances, but whole problems. In that connection, it has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem. Comprehensive solutions to identified problems must be translated into well integrated legislative programs.

"The objection, moreover, has practical as well as theoretical defects. Even as to the titles of [the Organized Crime Control bill] needed primarily in organized crime cases, there are very real limits on the degree to which such provisions can be strictly confined to organized crime cases. . . . On the other hand, each title . . . which is justified primarily in organized crime prosecutions has been confined to such cases to the maximum degree possible, while preserving the ability to administer the act and its effectiveness as a law enforcement tool." 116 Cong. Rec. 18913-18914 (1970).

Representative Poff, another sponsor of the legislation, also answered critics who complained that a definition of organized

crime was needed:

> "It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant?" *Id.*, at 35204.

See also *id.*, at 35344 (Rep. Poff) ("organized crime" simply "a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances," not a precise concept).

The thrust of these explanations seems to us reasonably clear. The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime. In Title IX, Congress picked out as key to RICO's application broad concepts that might fairly indicate an organized crime connection, but that it fully realized do not either individually or together provide anything approaching a perfect fit with "organized crime." See, *e. g.*, *id.* , at 18940 (Sen. McClellan) ("It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well").

It seems, moreover, highly unlikely that Congress would have intended the pattern requirement to be interpreted by reference to a concept that it had itself rejected for inclusion in the text of RICO at least in part because "it is probably impossible precisely and definitively to define." *Id.*, at 35204 (Rep. Poff). Congress

realized that the stereotypical view of organized crime as consisting in a circumscribed set of illegal activities, such as gambling and prostitution -- a view expressed in the definition included in the Omnibus Crime Control and Safe Streets Act, and repeated in the OCCA preamble --was no longer satisfactory because criminal activity had expanded into legitimate enterprises. See *United States v. Turkette*, 452 U. S., at 590-591. Section 1961(1) of RICO, with its very generous definition of "racketeering activity," acknowledges the breakdown of the traditional conception of organized crime, and responds to a new situation in which persons engaged in long-term criminal activity often operate *wholly* within legitimate enterprises. Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways. It would be counterproductive and a mismeasure of congressional intent now to adopt a narrow construction of the statute's pattern element that would require proof of an organized crime nexus.

As this Court stressed in *Sedima*, in rejecting a pinched construction of RICO's provision for a private civil action, adopted by a lower court because it perceived that RICO's use against non-organized-crime defendants was an "abuse" of the Act, "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises." 473 U. S., at 499. Legitimate businesses "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences"; and, as a result, § 1964(c)'s use "against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued." *Ibid.* If plaintiffs' ability to use RICO against businesses engaged in a pattern of criminal acts is a defect, we said, it is one "inherent in the statute as written," and hence

beyond our power to correct. *Ibid.* RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court. There is no more room in RICO's "self-consciously expansive language and overall approach" for the the imposition of an organized crime limitation than for the "amorphous 'racketeering injury' requirement" we rejected in *Sedima*, see *id.*, at 495, 498. We thus decline the invitation to invent a rule that RICO's pattern of racketeering concept requires an allegation and proof of an organized crime nexus.

IV

We turn now to the application of our analysis of RICO's pattern requirement. Because respondents prevailed on a motion under Federal Rule of Civil Procedure 12(b)(6), we read the facts alleged in the complaint in the light most favorable to petitioners. And we may only affirm the dismissal of the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. "*Hishon v. King & Spalding*, 467 U. S. 69, 73 (1984).

Petitioners' complaint alleges that at different times over the course of at least a 6-year period the noncommissioner respondents gave five members of the MPUC numerous bribes, in several different forms, with the objective -- in which they were allegedly successful -- of causing these Commissioners to approve unfair and unreasonable rates for Northwestern Bell. RICO defines bribery as a "racketeering activity," 18 U.S.C. § 1961(1), so petitioners have alleged multiple predicate acts.

Under the analysis we have set forth above, and consistent with the allegations in their complaint, petitioners may be able to prove that the multiple predicates alleged constitute "a pattern of racketeering activity," in that they satisfy the requirements of

relationship and continuity. The acts of bribery alleged are said to be related by a common purpose, to influence Commissioners in carrying out their duties in order to win approval of unfairly and unreasonably high rates for Northwestern Bell. Furthermore, petitioners claim that the racketeering predicates occurred with some frequency over at least a 6-year period, which may be sufficient to satisfy the continuity requirement. Alternatively, a threat of continuity of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise, the MPUC.

The Court of Appeals thus erred in affirming the District Court's dismissal of petititioners' complaint for failure to plead "a pattern of racketeering activity." The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 87-1252

H. J. INC., ET AL, ETC., PETITIONERS *v.* NORTHWESTERN BELL TELEPHONE COMPANY ET AL.

ON WRITE OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 1989]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, concurring in the judgment.

Four Terms ago, in *Sedima, S.P.R.L. v. IMREX CO.*, 473 U.S. 479 (1985), we gave lower courts the following four clues concerning the meaning of the enigmatic term "pattern of racketeering activity" in the Racketeer Influenced and Corrupt Organizations Act (RICO or the Act), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968 (1982 ed. and Supp. V). First, we stated that the statutory definition of the term in 18 U.S.C. § 1961(5) implies "that while two acts are necessary, they may not be sufficient." *Sedima*, 473 U.S., at 496, n. 14. Second, we pointed out that "two isolated acts of racketeering activity," "sporadic activity," and "proof of two acts of racketeering activity, without more" would not be enough to constitute a pattern. *Ibid.* Third, we quoted a snippet from the legislative history stating "[i]t is this factor of *continuity plus relationship* which combines to

produce a pattern." *Ibid.* Finally, we directed lower courts' attention to 18 U.S.C. § 3575(e), which defined the term "pattern of conduct which was criminal" used in a different title of the same Act, and instructed them that "[t]his language may be useful in interpreting other sections of the Act," *ibid.* Thus enlightened, the district and circuit courts set out "to develop a meaningful concept of 'pattern,'" *id.*, at 500, and promptly produced the widest and most persistent circuit split on an issue of federal law in recent memory, see, *e.g.*, *ante*, at 4, n.2. Today, four years and countless millions in damages and attorney's fees later (not to mention prison sentences under the criminal provisions of RICO), the Court does little more than repromulgate those hints as to what RICO means, though with the caveat that Congress intended that they be applied using a "flexible approach." *Ante*, at 7.

Elevating to the level of statutory text a phrase taken from the legislative history, the Court counsels the lower courts: "continuity plus relationship." *Ante*, at 8 (emphasis deleted). This seems to me about as helpful to the conduct of their affairs as "life is a fountain." Of the two parts of this talismanic phrase, the relatedness requirement is said to be the "easier to define," *ibid.*, yet here is the Court's definition, *in toto*: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events," *ante*, at 9. This definition has the feel of being solidly rooted in law, since it is a direct quotation of 18 U.S.C. § 3575(e). Unfortunately, if normal (and sensible) rules of statutory construction were followed, the existence of §3575(e) -- which is the definition contained in another Title of the Act that was explicitly *not* rendered applicable to RICO -- suggests that *whatever* "pattern" might mean in RICO, it assuredly *does not*

mean that. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). But that does not really matter, since § 3575(e) is utterly uninformative anyway. It hardly closes in on the target to know that "relatedness" refers to acts that are related by "purposes, results, participants, victims, . . . methods of commission, *or* [just in case that is not vague enough] *otherwise*." Is the fact that the victims of both predicate acts were women enough? Or that both acts had the purpose of enriching the defendant? Or that the different coparticipants of the defendant in both acts were his co-employees? I doubt that the lower courts will find the Court's instructions much more helpful than telling them to look for a "pattern" -- which is what the statute already says.

The Court finds "continuity" more difficult to define precisely. "Continuity," it says, "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Ante*, at 10. I have no idea what this concept of a "closed period of repeated conduct" means. Virtually all allegations of racketeering activity, in both civil and criminal suites, will relate to past periods that are "closed" (unless one expects plaintiff or the prosecutor to establish that the defendant not only committed the crimes he did, but is still committing them), and all of them *must* relate to conduct that is "repeated," because of RICO's multiple-act requirement. I had thought, initially, that the Court was seeking to draw a distinction between, on the one hand, past repeated conduct (multiple racketeering acts) that is "closed-ended" in the sense that, in its totality, it constitutes only one criminal

"scheme" or "episode"--which would not fall within RICO unless in its nature (for one or more the reasons later described by the Court, see *ante*, at 11) it threatened future criminal endeavors as well; and, on the other hand, past repeated conduct (multiple racketeering acts) that constitutes several separate schemes -- which is alone enough to invoke RICO. But of course that cannot be what it means, since the Court rejects the "multiple-schemes" concept, not merely as the *exclusive* touchstone of RICO liability, see *ante*, at 9, but in all its applications, since it "introduc[es] a concept . . . that appears nowhere in the language or legislative history of the Act," *ante*, at 9-10, and is so vague and "amorphous" as to exist only "in the eye of the beholder," *ante*, at 10, n. 3. Moreover, the Court tells us that predicate acts extending, not over a "substantial period of time," but only over a "few weeks or months and threatening no future criminal conduct" do not satisfy the continuity requirement. Since the Court has rejected the concept of separate criminal "schemes" or "episodes" as a criterion of "threatening future criminal conduct," I think it must be saying that at least a few months of racketeering activity (and who knows how much more?) is generally for free, as far as RICO is concerned. The "closed period" concept is a sort of safe harbor for racketeering activity that does not last *too* long, no matter how many different crimes and different schemes are involved, so long as it does not otherwise "establish a threat of continued racketeering activity," *ante*, at 11. A gang of hoodlums that commits one act of extortion on Monday in New York, a second in Chicago on Tuesday, a third in San Francisco on Wednesday, and so on through an entire week, and then finally and completely disbands, cannot be reached under RICO. I am sure that is not what the statute intends, but I cannot imagine what else the Court's murky discussion can possibly mean.

Of course it cannot be said that the Court's opinion operates only in the direction of letting some obvious racketeers get out of RICO. It also makes it clear that a hitherto dubious category is included, by establishing the rule that the "multiple scheme" test applied by the Court of Appeals here is not only nonexclusive but indeed nonexistent. This is, as far as I can discern, the Court's only substantive contribution to our prior guidance--and it is a contribution that makes it *more* rather than *less* difficult for a potential defendant to know whether his conduct is covered by RICO. Even if he is only involved in a single scheme, he may still be covered if there is present whatever is needed to establish a "threat of continuity." The Court gives us a nonexclusive list of three things that do so. Two of those presumably polar examples seem to me extremely difficult to apply--whether "the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes," *ante*, at 11, and whether "the predicates are a regular way of conducting defendant's ongoing legitimate business," *ante*, at 12. What is included beyond these examples is vaguer still.

It is, however, unfair to be so critical of the Court's effort, because I would be unable to provide an interpretation of RICO that gives significantly more guidance concerning its application. It is clear to me from the prologue of the statute, which describes a relatively narrow focus upon "organized crime," see Statement of Findings and Purpose, The Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922-923, that the word "pattern" in the phrase "pattern" of racketeering activity" was meant to import some requirement beyond the mere existence of multiple predicate acts. Thus, when § 1961(5) says that a pattern "requires at least two acts of racketeering activity" it is describing what is needful but not sufficient. (If that were not the case, the concept of

"pattern" would have been unnecessary, and the statute could simply have attached liability to "multiple acts of racketeering activity.") But what that something more is, is beyond me. As I have suggested, it is also beyond the Court. Today's opinion has added nothing to improve our prior guidance, which has created a kaleidoscope of circuit positions, except to clarify that RICO may in addition be violated when there is a "threat of continuity." It seems to me this increases rather than removes the vagueness. There is no reason to believe that the Courts of Appeals will be any more unified in the future, than they have in the past, regarding the content of this law.

That situation is bad enough with respect to any statute, but it is intolerable with respect to RICO. For it is not only true, as JUSTICE MARSHALL commented in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), that our interpretation of RICO has "quite simply revolutionize[d] private litigation" and "validate[d] the federalization of broad areas of state common law of frauds," *id.*, at 501 (dissenting opinion), so that clarity and predictability in RICO's civil applications are particularly important; but it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws, *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954). No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statue anything more than today's meager guidance bodes ill for the day when that challenge is presented.

However unhelpful its guidance may be, however, I think the court is correct in saying that nothing in the statute supports the proposition that predicate acts constituting part of a single scheme (or single episode) can never support a cause of action under

RICO. Since the Court of Appeals here rested its decision on the contrary proposition, I concur in the judgment of the Court reversing the decision below.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

H.J., Inc. et al Appellants - Plaintiff	No. 4-86 Civ 546
vs.	Clerk's Notice under Rule 77(d) F. R. Civil Procedure
Northwestern Bell et al Appellees - Defendant	

You are hereby notifed that in the above-entitled cause, on the

12 day of Nov, 19 87

We filed,

CERTIFIED COPY OF MANDATE FROM THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

CERTIFIED COPY OF JUDGMENT THAT: After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

FRANCIS E. DOSAL, Clerk

By: S.J.L.
Deputy Clerk

Cochrane & Bresnahan
John Cochrane
24 East 4th Street
St. Paul, MN 55101

Reinhardt & Anderson
Mark Reinhardt
1014 Conwed Tower
St. Paul, MN 55101

Faegre & Benson
James L. Volling
2300 Multifoods Tower
33 South Sixth Street
Minneapolis, MN 55402

Stephen T. Refsell, Esq
Northwestern Bell Telephone Company
Room 1800
200 South Fifth Street
Minneapolis, MN 55402

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5121MN

H. J, Inc., etc., et al,	*	
	*	
Appellants,	*	
	*	
vs.	*	Appeal from the United
	*	States District Court
Northwestern Bell Telephone	*	for the District of
Company, etc., et al,	*	Minnesota.
	*	
Appellees.	*	
	*	

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 23, 1987

Order entered at the Direction of the Court:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5121

H. J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Issac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,	*	
Appellants,	*	Appeal from the United States District Court for the District of Minnesota.
v.	*	
Northwestern Bell Telephone Company, a subsidiary of U. S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed co-conspirators,	*	
Appellees.	*	

Submitted: September 2, 1987

Filed: September 22, 1987

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HENLEY, Senior Circuit Judge.

Plaintiffs appeal from the district court's[1] order dismissing their complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6); H. J. Inc. v. Northwestern Bell Telephone Co., 648 F. Supp. 419, 430 (D. Minn. 1986). Appellants' complaint alleged, inter alia, violations of the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. §§ 1961-68 (RICO). We affirm.

Because appellants' complaint was dismissed pursuant to Rule 12 (b)(6), we view the facts alleged in their complaint in the light most favorable to them. Bennett v. Berg, 685 F.2d 1053, 1057-58 (8th Cir. 1982), cert. denied, 464 U.S. 1008 (1983). The gravamen of appellants' complaint is that appellee Northwestern Bell Telephone Company undertook to illegally influence members of the Minnesota Public Utilities Commission (MPUC), the state regulatory body responsible for determining the rates which

[1] The Honorable Harry H. MacLaughlin, United States District Judge, District of Minnesota.

Northwestern Bell may charge. Appellants claim that Northwestern Bell sought to influence individual MPUC commissioners by various methods including cash gifts, employment offers, tickets to sporting and cultural events, airline tickets, meals and parties. Appellants allege a series of episodes beginning in 1980 and claim the practices continue through the present. The district court dismissed appellants' RICO claims for failure to allege a pattern of racketeering activity. H. J. Inc., 648 F. Supp. at 423-26.

The core requirement for a RICO violation is a pattern of racketeering activity. 18 U.S.C. § 1962. See Sedima, S.P.R.L. v. Imex Co., 105 S.Ct. 3275, 3287 (1985). At the minimum, at least two acts of racketeering activity[2] are required to establish a pattern. Sedima, 105 S.Ct. at 3285 n.14. However, "while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.'" Id. Prior to Sedima the pattern requirement could be met by simply pleading two acts of racketeering activity. See Superior Oil Co. v. Fulmer, 785 F.2d 252, 255-56 (8th Cir. 1986). In Sedima the Supreme Court chastised Congress and the courts for failing to develop a workable definition of "pattern" which would limit the abuse of civil RICO. Sedima, 105 S.Ct. at 3287. Accordingly, this circuit has undertaken more meaningfully to construe the concept of "pattern."

We have followed the Sedima Court's intimations and have required the combination of continuity plus relationship to establish the necessary pattern. Superior Oil, 785 F.2d at 257. See Holmberg v. Marrisette, 800 F.2d 205, 209-10 (8th Cir. 1986), cert.

---

[2] "Racketeering activity" has been defined to include a broad range of criminal offenses. 18 U.S.C. § 1961(1).

denied, 107 S.Ct. 1953 (1987). "The term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan), quoted in Sedima, 105 S.Ct. at 3285 n.14. The relationship prong is met when two or more racketeering acts are shown to be in pursuit of the same overarching scheme. See Holmberg, 800 F.2d at 210; Superior Oil, 785 F.2d at 257. The district court found that appellants' complaint satisfied the relationship prong. H. J. Inc., 648 F. Supp. at 425. We agree.

The burden of establishing the continuity prong has proven more onerous. "The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 91-617, p.158 (1969), quoted in Sedima, 105 S.Ct. 3285 n.14. In order to demonstrate the necessary continuity appellants must allege that Northwestern Bell "had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities." Deviries v. Prudential-Bache Securities, Inc., 805 F.2d 326, 329 (8th Cir. 1986). A single fraudulent effort or scheme is insufficient. Id. See also Ornest v. Delaware North Cos., 818 F.2d 651, 652 (8th Cir. 1987) (single scheme over eight years to defraud plaintiffs of sales commissions); Madden v. Gluck, 815 F.2d 1163, 1164 (8th Cir. 1987) (defendant engaged in a vast array of fraudulent activities in pursuit of a single goal to keep a company afloat in order to loot it). Appellants' complaint alleges no more than a series of fraudulent acts "committed in furtherance of a single scheme to influence MPUC commissioners. . . ." H. J. Inc., 648 F. Supp. at 425.

The district court did not err in finding that appellants' complaint failed to satisfy the continuity prong as articulated in this circuit.[3] Therefore, because dismissal was appropriate under Rule 12(b)(6), we do not address the other issues raised in this appeal. The decision of the district court is affirmed.[4]

McMILLIAN, Circuit Judge, concurring.

I fully concur in the decision to affirm the district court's dismissal of the complaint for failure to satisfy the continuity prong of the pattern of racketeering activity test adopted by this circuit. I write separately only to state that I agree with Judge John R. Gibson that we should reconsider our pattern of racketeering activity test, in light of the contrary positions recently taken by several other circuits.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the court's opinion because I am satisfied that this result is compelled by our earlier cases commencing with Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986). In Henning v. First Bank of Worthington, No. 86-5320 (8th Cir. July 7, 1987), I concurred separately and expressed my view that the

---

[3] We are aware that our continuity plus relationship approach to the pattern requirement is not without criticism. See Sun Savings & Loan Association v. Dierdorff, No. 86-5811, 56 U.S.L.W. 2110 (9th Cir. Aug. 7, 1987); United States v. Ianniello, 808 F.2d 184, 192 (2d Cir. 1986).

[4] Appellants also alleged in their complaint pendent state law claims which were dismissed by the district court when the basis for pendent jurisdiction (the RICO claim) was dismissed. At oral argument the court was advised that state court proceedings had been or were to be initiated. We, of course, do not reach any such claims in this opinion.

multiple scheme requirement that we have grafted onto the pattern element strays from the statutory language of RICO. The Second and Seventh Circuits, and now the Ninth Circuit, as well as numerous district courts and a respected scholar in this field, have criticized our position.[1]

I believe, as stated in my separate concurrence in Henning, that when a proper case arises the multiple scheme requirement should be examined by the court en banc.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[1] See Henning, supra, footnote 5, and Sun Savings & Loan Assn. v. Dierdorff, No. 86-5811, 56 U.S.L.W. 2110 (9th Cir. Aug. 7, 1987).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Plaintiffs,

CIVIL 4-86-546

v.

MEMORANDUM AND ORDER

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants.

Mark Reinhardt, Susan Bedor, Reinhardt & Anderson, 1014 Conwed Tower, 444 Cedar Street, St. Paul, MN 55101, and John Cochrane, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101, for plaintiffs.

John D. French, John F. Beukema, James L. Volling, Joseph H. Otterstetter, Faegre & Benson, 2300 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, and Stephen T. Refsell, General Attorney, Northwestern Bell Telephone Company, Room 1800, 200 South Fifth Street, Minneapolis, MN 55402, for defendants.

This matter is before the Court on plaintiffs' motion to reconsider. Plaintiffs' motion will be denied.

FACTS

This is a class action arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Plaintiffs also bring a state law claim pursuant to the Court's pendent jurisdiction, alleging acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and the common law of bribery. By order dated November 21, 1986, the Court granted defendant Northwestern Bell Telephone Co.'s (Northwestern Bell) motion to dismiss the complaint in its entirety. The facts of the case are set forth in the Court's prior order and will not be extensively reprised here. In brief, plaintiffs allege that Northwestern Bell, by and through its corporate agents, initiated a scheme designed to illegally influence various members of the Minnesota Public Utilities Commission (MPUC), the regulatory body which sets rates which Northwestern Bell may charge for the goods and services it provides. Plaintiffs allege that from early 1980 and through the present Northwestern Bell has offered benefits, rewards and consideration to certain MPUC commissioners, including bribes, offers of employment and various gifts, free meals, and

emoluments, with intent to influence these commissioners in the performance of their duties. In its November 21 memorandum and order, the Court found that plaintiffs had failed to allege a "pattern" of racketeering within the meaning of the RICO statute, and accordingly granted defendant's motion to dismiss the RICO counts of plaintiffs' amended complaint. The Court dismissed plaintiffs' pendent state law claim without prejudice. Plaintiffs now bring this motion for reconsideration.

DISCUSSION

A. Pattern of Racketeering Activity

It is by now well established that in order to establish a civil RICO cause of action plaintiffs must prove the existence of four elements: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. See Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275, 3285 (1985) (footnote omitted); Simon v. Fribourg, CIVIL 4-86-259, slip op. at 9 (D.Minn. Aug. 20, 1986). The RICO act defines "pattern of racketeering injury" in the following terms:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1961(5). In Sedima the Supreme Court pointed out that while at least two acts of racketeering are necessary to form a pattern, two acts may not be sufficient. Sedima, 105 S.Ct. at 3285 n.14. Rather, it is the factor of continuity plus relationship which combines to produce a pattern. Sedima, 105 S.Ct. at 3285 n.14, citing S.Rep.No. 91-617, p. 158 (1969). In passing, the

Sedima majority noted that the failure of Congress or the courts to develop a meaningful concept of "pattern" has contributed to the expansive potential of RICO's application, and suggested that a stricter interpretation of the pattern requirement might be the key to arresting civil RICO's explosive growth. Sedima, 105 S.Ct. at 3287. Subsequently, the lower courts have accepted the Supreme Court's invitation to flesh out the pattern element, albeit with varying results. See, e.g., Frankart Distributors, Inc. v. RMR Advertising, Inc., 632 F.Supp. 1198, 1200 (S.D.N.Y. 1986) (numerous courts have struggled with establishing a definition of pattern of racketeering activity in light of the Sedima Court's reasoning and the clear objectives of the RICO statute); Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 785 F.2d 1274, 1280 n.7 (5th Cir. 1986) (Fifth Circuit directed its lower courts to consider more rigorous interpretation of the pattern requirement).

In the language of one of the more trusted sources for the definition of English words, a "pattern" is defined as: "an arrangement or composition that suggests or reveals a design; a configuration . . . ." WEBSTER'S NEW COLLEGIATE DICTIONARY (C & G Merriam Co. 1961), cited in United States v. Freshie Co., 639 F.Supp. 442, 444 (E.D.Pa. 1986). The Omnibus Crime Control Act of 1970 provides that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e), cited in Sedima, 105 S.Ct. at 3285 n.14. The courts have suggested that to compose a pattern "the acts complained of must be related to and similar in purpose, and must be part of an ongoing series of acts, rather than separate incidents in a series of sporadic activities." Louisiana

Power and Light Co. v. United Gas Pipe Line Co., 642 F.Supp. 781, 808 (E.D.La. 1986), citing Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986). In their search for a meaningful interpretation of "pattern" the courts have focused on the dual requirements of "relationship" and "continuity" highlighted by the Sedima majority.

1. Relationship

Relationship generally has proved the less problematic of the prongs enunciated by Sedima. It has been stated that to be related, the predicate acts of a RICO claim must involve common perpetrators, common methods of commission, common victims, and a common motive or purpose. Medallion TV Enterprises, Inc. v. SelecTV of California, Inc., 627 F.Supp. 1290, 1296 (C.D.Cal. 1986); Graham v. Slaughter, 624 F.Supp. 222, 225 (N.D.Ill. 1985); Allington v. Carpenter, 619 F.Supp. 474, 478 (C.D.Cal. 1985). Relationship requires that the acts of racketeering be related to the operation of the enterprise, that is, sufficiently related to the statutorily proscribed conduct. Papai v. Cremosnik, 635 F.Supp. 1402, 1407-08 (N.D. Ill. 1986); Technology Exchange Corp. of America, Inc. v. Grant County State Bank, 646 F.Supp. 179, 183 (D.Colo. 1986). As stated by the United States Court of Appeals for the Seventh Circuit in Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986), "[r]elationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct." Morgan, 804 F.2d at 975. In this case, it is clear that plaintiffs have alleged a "relationship" among and between the predicate acts of racketeering enumerated in their amended complaint. Plaintiffs have identified common perpetrators, Northwestern Bell and certain of its officers and agents; common victims, Northwestern Bell's ratepayers; and a common motive or purpose, improper influence

of MPUC commissioners through bribes, gifts and assorted emoluments. Plaintiffs have alleged that the acts of racketeering are related to the operation of the enterprise, and that each of these acts was directed toward a similar end. In this case, as in most reported RICO decisions, plaintiffs have little difficulty surmounting the "relationship" barrier.

2. Continuity

As the Court noted in its November 21 order, continuity presents a more problematic analysis, both on the facts of this case and in general. At a minimum, continuity means that plaintiffs must allege "more than sporadic or isolated activity." Graham, 624 F.Supp. at 225. The term pattern "connotes a multiplicity of events: . . . The continuity inherent in the term presumes repeated criminal activity, not merely repeated acts to carry out the same criminal activity." Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F.Supp. 828, 831 (N.D.Ill. 1985). In this respect, ongoing criminal activity or at least a threat of ongoing criminal activity is a key indicium of continuity. Ghouth v. Conticommodity Services, Inc., 642 F.Supp. 1325, 1337 (N.D.Ill. 1986). One court has stated that in determining whether continuity exists, courts should look to "the purposes, results, participants, victims and methods of commission." Technology Exchange, 646 F. Supp. at 183-84. Quite obviously, these are identical to the factors to be assessed in gauging "relatedness." The "inherent contradiction" which exists between the dual requirements of relatedness and continuity is perhaps resolved by recognizing that relatedness requires proof that the predicate acts are "sufficiently connected," while, in contrast, continuity requires proof that the predicate acts are "sufficiently differentiated." Freshie, 639 F.Supp. at 445; Allington, 619 F.Supp. at 478. To prove relatedness, plaintiffs must demonstrate that the predicate acts evince common perpetra-

tors, victims, methods, motive or purpose. To prove continuity, plaintiffs must demonstrate that the racketeering acts are "sufficiently unconnected in time or substance to warrant consideration as separate criminal episodes." Allington, 619 F.Supp. at 478. As stated in Freshie:

> [A]n inherent tension exists between the dual requirements of relatedness and continuity. Viewed on a continuum, these two requirements must reach some equitable balance to form a "pattern." . . . [T]he acts must be "sufficiently connected, but also sufficiently differentiated." . . . [A]s the acts become more related, the same transactions lose some of their separateness. On the other hand, if a series of predicate acts satisfied the requirement of "separate criminal episodes," then those acts might well not meet the relatedness requirement, being too disjointed (different subject matter) and too remote (in time).

Freshie, 639 F.Supp. at 445 (citations omitted).

The United States Court of Appeals for the Eighth Circuit has had an opportunity to address the continuity requirement in four post-Sedima decisions. In Alexander Grant and Co. v. Tiffany Industries, Inc., 770 F.2d 717 (8th Cir. 1985), cert. denied, 106 S.Ct. 799 (1986), the Court stated in dictum that plaintiff's allegations of twenty-six acts of mail fraud and four acts of wire fraud were sufficient to demonstrate a pattern of racketeering activity. The Court declared:

> The number and nature of acts, together with allegations demonstrating their similar purposes, results, participants, victims, and methods of commission, bespeak a sufficient "continuity plus relationship" to satisfy the Supreme Court's concerns in Sedima that RICO not be extended to reach sporadic activity.

Alexander Grant, 770 F.2d at 718 n.1.

In Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir.1986) the court found that plaintiff 's allegations of several related acts of mail and wire fraud in furtherance of a scheme to convert gas from plaintiff's pipeline did not rise to the level of a "pattern" of racketeering activity. The Court declared that proof of a single fraudulent scheme, implemented by several fraudulent acts, does not bespeak "continuity" in the absence of proof that the defendants "had ever done these activities in the past . . . [or] that they were engaged in other criminal activities elsewhere," Superior Oil, 785 F.2d at 257. The court concluded:

> The actions of [defendants] comprised one continuing scheme to convert gas from [plaintiff's] pipeline. . . . On the facts of this case, we agree with the court's conclusion in Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F.Supp. 828, 832 (D.C.Ill. 1985), that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. * * * It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Superior Oil, 785 F.2d at 257 (footnote omitted).

In Holmberg v. Morrisette, 800 F.2d 205 (8th Cir. 1986), plaintiff offered proof of several acts of wire or mail fraud related to a single scheme to draw letters of credit. The Eighth Circuit found that, because defendants' fraudulent acts were undertaken as part of a "common purpose or scheme," there was no showing of continuity, absent proof that the defendants "had engaged in like activities in the past or that they were engaged in other criminal activities." Holmberg, 800 F.2d at 210. In the absence of allegations of like wrongful activity in the past or other wrongful activity

elsewhere, plaintiff's RICO claim was found to be fatally defective.

The most recent Eighth Circuit teaching on the subject is Deviries v. Prudential-Bache Securities, Inc., 805 F.2d 326 (8th Cir. 1986). In Deviries plaintiff alleged that the defendant had made misrepresentations to secure his securities brokerage account and then "churned" the account over a six-year period. The Eighth Circuit found that each of the predicate acts alleged were committed in furtherance of a single "scheme," and that accordingly, plaintiff had "failed to allege the continuity necessary to establish a 'pattern' of racketeering activity." Deviries, 805 F.2d at 329. Following Superior Oil and Holmberg, the Deviries court found plaintiff's allegations of a "pattern" insufficient absent an "allegation that [defendants] had engaged in similar endeavors in the past or that they were engaged in other criminal activities." Deviries, 805 F.2d at 329.

As a number of courts and commentators have noted, the Eighth Circuit's approach to the pattern requirement lies at one end of the spectrum of post-Sedima RICO "pattern" jurisprudence. What is required to allege a pattern of racketeering activity in the Eighth Circuit is proof of multiple criminal schemes or episodes, that is, that defendants have engaged in similar criminal activities in the past or are engaged in other criminal activities elsewhere. Critics of this approach point out that it appears to run contrary to the Sedima court's directive that "RICO is to 'be liberally construed to effectuate its remedial purposes,'" Sedima, 105 S.Ct. at 3286, quoting Pub.L. 91-452, § 904(a), 84 Stat. 947, and that "the imposition of a 'multi-scheme' requirement . . . could arbitrarily exclude large-scale frauds from [RICO's] scope simply because the actors' overall goal -- while perhaps no less ambitious or ultimately harmful than a series of short-range illegal plots -- happens to be a monolithic one." McLendon v. the Continental Group, Inc., No.

83-1340, slip op. at 8 (D.N.J. July 31, 1986); Morgan, 804 F.2d at 975. Advocates of the Eighth Circuit's restrictive approach contend that "[t]his construction of the pattern requirement is the only construction that effectuates Congress' intent to avoid imposition of RICO liability where there have been only isolated or sporadic criminal acts." Frankart, 632 F. Supp. at 1201. See, e.g., Simon, slip op. at 9 (no pattern where plaintiff does not allege that defendants concocted a similar scheme in any other year or that they were otherwise involved in any criminal activity); Kredietbank, N.V. v. Joyce Morris, Inc., CIVIL No. 84-1903 slip op. (D.N.J. Oct. 11, 1985) (a series of fraudulent mailings did not constitute a pattern of racketeering activity where mailings were all aimed at implementing a single fraudulent scheme); Medical Emergency Service Association S.C. v. Foulke, CIVIL 85-4064, slip op. (N.D. Ill. Jan. 7, 1986) (multiple mailings in furtherance of a single criminal episode are insufficient to establish a pattern of racketeering activity); Dunham v. Independence Bank of Chicago, 629 F.Supp. 983 (N.D. Ill. 1986) (no pattern where each of the predicate acts occurred in the execution of a single, though repeated, substantive misrepresentation); Professional Assets Management, Inc. v. Penn Square Bank, N.A., 616 F.Supp. 1418 (W.D.Okla. 1985) (no pattern where claim arises from one engagement to perform one bank audit); Teleprompter of Erie, Inc. v. City of Erie, 537 F.Supp. 6 (W.D.Pa. 1981) (multiple bribes received by councilman at a political fundraiser did not constitute a pattern); Rich Maid Kitchens, Inc. v. Pennsylvania Lumbermens Mutual Insurance Co., 641 F.Supp. 297 (E.D.Pa. 1986) (one isolated fraudulent scheme, even if containing more than one fraudulent act, is not enough to constitute a pattern); Richardson Greenshields of Canada Ltd. v. Patel, 643 F.Supp. 672 (S.D.N.Y. 1986) (no pattern where predicate acts were part of a single, unified activity); Exeter

Towers Associates v. Bowditch, 604 F.Supp. 1547 (D.Mass. 1985) (two acts of mail fraud in connection with the purchase of a single mortgage does not constitute a pattern).

At the other extreme are those cases, most notably the decision of the United States Court of Appeals for the Fifth Circuit in R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985), holding that a showing of two related predicate acts is sufficient. See also Trak Microcomputer Corp. v. Wearne Bros., 628 F.Supp. 1089 (N.D. Ill. 1985); Conan Properties, Inc. v. Mattel, Inc., 619 F.Supp. 1167 (S.D.N.Y. 1985); Systems Research, Inc. v. Random, Inc., 614 F.Supp. 494 (N.D.Ill. 1985). Critics of this approach point out that it will invariably "sweep into federal courts, under RICO, the great majority of actions for fraud in commercial transactions." Exeter, 604 F.Supp. at 1554.[1]

A number of courts, most notably the United States Court of Appeals for the Eleventh Circuit in Bank of America National Trust & Savings Association v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986), have attempted to steer a middle ground, holding that a single fraudulent scheme which encompasses various predicate acts over a significant period of time satisfies the pattern requirement. See Freshie, 639 F. Supp. at 444. Under this approach, it is not necessary to allege multiple criminal schemes, provided that plaintiff alleges an "open-ended scheme" over an extended period of time evincing criminal activity which is continuous in nature rather than isolated. B.J. Skin & Nail Care, Inc. v. International Cosmetic Exchange, Inc., 641 F.Supp. 563,

---

[1]The R.A.G.S. opinion is unpersuasive for another reason. In the subsequently decided Smoky Greenhaw opinion the Fifth Circuit seemed to suggest that the nature of the pattern requirement remained an open question, without reference to R.A.G.S. See Smoky Greenhaw, 785 F.2d at 1280 n.7.

566 (D.Conn. 1986). In Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986), the Seventh Circuit appeared to adopt this intermediate approach, holding that "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., 'transactions' somewhat separated in time and place." . . . ." Morgan, 804 F.2d at 975. Advocates of the intermediate approach, dubbed the "multiple episodes plus ongoing course of conduct" standard, Gidwitz v. Stirco, Inc., 646 F.Supp. 825, 829 (N.D.Ill. 1986), contend that it deflects "garden variety" commercial fraud cases while sweeping into the RICO net those cases which are large in scale albeit monolithic. See, e.g., Temporaries, Inc. v. Maryland National Bank, 638 F.Supp. 118 (D.Md. 1986); Louisiana Power, 642 F.Supp. at 808; Freshie, 639 F.Supp. at 445.

Plaintiffs urge the Court to adopt the intermediate approach above-referenced and to find that because the amended complaint includes allegations of various predicate acts committed over an extended, identifiable period of time, the continuity aspect of the pattern requirement is met, notwithstanding that these predicate acts transpired in connection with a single "scheme." As stated by the Court in its prior order, were the Court writing on a clean slate these arguments might well be persuasive. The Eighth Circuit has thrice held, however, that continuity requires proof of multiple criminal episodes. Superior Oil, 785 F.2d at 257; Holmberg, 800 F.2d at 210; Deviries, 805 F.2d at 329. This unbroken line of authority the Court is not free to disregard. Here, plaintiffs' amended complaint includes no allegations of separate transactions -- merely separate predicate acts -- and no allegations that these predicate acts have independent harmful significance. Each of the predicate acts alleged by plaintiffs was committed in furtherance

of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. The Court is obliged to turn to the language of Superior Oil, Holmberg, and Deviries: plaintiffs simply have not alleged that defendants have engaged in like activities in the past or that they are engaged in other criminal activities elsewhere.

The approach adopted by the Eighth Circuit is designed to give meaning to Congress' intended rejection of RICO liability predicated upon isolated or sporadic criminal acts. Allington, 619 F.Supp. at 478, citing 116 Cong.Rec. 35193 (statement of Rep. Poff) (RICO not aimed at the isolated offender). Moreover, the requirement that plaintiffs in a civil RICO action demonstrate that the predicate acts occurred in different criminal episodes is consistent with the connotation of multiple events implicit in the term pattern. Medallion TV, 627 F. Supp. at 1296. A "pattern" requires more than one single criminal episode carved into distinct predicate acts. Commercial Agropequaria Menichetti Fuente S.A.C. I. v. Heather Trading Corp., 85 CIVIL 3240, slip op. at 8 (S.D.N.Y. Mar. 27, 1986), cited at Richardson, 643 F.Supp. at 674.[2] Although plaintiffs have alleged numerous predicate acts over an extended period of time, it is clear that these acts were part and parcel of a unified, monolithic criminal scheme. The predicate acts alleged by plaintiffs are not "sufficiently unconnected in time and substance to warrant consideration as separate criminal episodes." Medallion TV, 627 F. Supp. at 1297.

Plaintiffs urge the Court to depart from the multiple

---

[2] As stated by Justice Powell in his Sedima dissent, "[t]he definition of pattern may . . . logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a 'pattern' to be proved." Sedima, 105 S.Ct. at 3289 (Powell, J. dissenting).

criminal schemes test adopted by the Eighth Circuit and to focus instead on factors such as the duration of the alleged racketeering activity and the number of victims. A number of courts and commentators have noted that an interpretation of "pattern" which turns on fine distinctions between single or multiple "episodes" or "schemes" is ill-suited to accomplishment of RICO's central purpose, the eradication of "traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises." ABA Ad Hoc Civil task Force 71, quoted in Sedima, 105 S.Ct. at 3289 (Powell, J., dissenting). These courts have focused analysis on several relevant factors, including:

(1) Duration -- One indicium of "continuity" is the duration of the alleged criminal activity. To the extent plaintiff alleges criminal activity which is ongoing over an identified period of time, the possibilities are enhanced that defendants are indeed engaged in traditional mobster activity or comparable ongoing structured criminal enterprises. Conversely, where the predicate acts are of a finite and limited duration, directed at a specific goal, the likelihood increases that ordinary commercial fraud is involved.

(2) Threat of Ongoing Criminal Activity -- Hand-in-hand with duration, which focuses on past events, is the threat of ongoing criminal activity, which focuses on the likelihood that defendant's criminal activities will continue into the future. Absent allegations that defendants' scheme has the potential to continue indefinitely a strong likelihood exists that the wrongs alleged are isolated, not systematic.

(3) Multiple Victims -- One characteristic of traditional mobster activity or comparable ongoing structured criminal enterprises is the presence of many victims. "The repetition of an act taken against a single victim . . . suggests no expansion, no ongoing design, no continuity, such as was the target of Congress"

in enacting RICO. Satellite Financial Planning Corp. v. First National Bank of Wilmington, 646 F.Supp. 118, 120 (D.Del. 1986); Kriedtbank, slip op. at 9.

(4) **Independent Harmful Significance** -- Some courts have looked to the independent harmful significance of the predicate acts alleged by plaintiffs as an indicium of continuity. A predicate act has independent harmful significance if, standing alone, it brings about the injury complained of. A predicate act lacks independent harmful significance if it brings about injury only in conjunction with other predicate acts.

(5) **Methods of Commission** -- One factor frequently cited by the courts is the methods of commission employed by the defendants. This factor is perhaps less useful than the others, in that it is well-accepted that the mere fact that defendants have employed more than one fraudulent method does not establish a pattern.

(6) **Regular Part of Defendants' Business** -- One court has suggested that "RICO's purposes are best served by also requiring that . . . a reasonable inference can be made that these episodes were not an aberration in the way a defendant conducted his business. Rather, the pattern made up of multiple episodes must be a regular part of the way a defendant does business and in that sense, ongoing." Papai, 635 F.Supp. at 1412.

The above-referenced factors have been highlighted by some courts as having relevance to the pattern inquiry. The courts have noted that these factors are not exhaustive and that all factors need not be proven in each case. The pattern question must inevitably be decided on a case-by-case basis. Ghouth, 642 F.Supp. at 1337. The intent of this analysis is to "flesh out the identifying characteristics of the [term] 'episode,' using the concept of 'continuity' as a guidepost." Ghouth, 642 F.Supp. at 1339.

Even assuming that these factors have relevance, the Court would still be constrained to find that plaintiffs have not alleged a pattern of racketeering activity. Plaintiffs have alleged criminal activity of long duration. Whether plaintiffs have alleged the threat of continuing criminal activity is a closer question, particularly in view of the review by the MPUC of its past actions. Plaintiffs have alleged the presence of multiple victims, assuming that the body of Northwestern Bell ratepayers is not one corporate victim, but has not shown independent harmful significance, since it is the aggregate of predicate acts which produced their injuries. Plaintiffs have alleged various methods of commission. It cannot be said, however, that the alleged "pattern" of predicate acts is a "regular part of the way" defendants conduct their business. On balance, the Court finds that, applying the enumerated factors, plaintiffs' allegations do not fit the RICO paradigm. Of course, in the Eighth Circuit the governing standard is the multiple criminal episodes test of Superior Oil, Holmberg, and Deviries. Applying this test, the Court finds that plaintiffs have not alleged a pattern of racketeering activity. Accordingly, plaintiffs' motion for reconsideration of the Court's RICO ruling is denied.

3. Enterprise -- Person

Plaintiffs' Count II arises under RICO, 18 U.S.C. § 1962(a). For purposes of their section 1962(a) claim, plaintiffs allege that Northwestern Bell is both a "person" within the meaning of 18 U.S.C. § 1961(3) and an "enterprise" within the meaning of 18 U.S.C. § 1961(4). In its November 21 order the Court noted that the Eighth Circuit has ruled that for purposes of a claim arising under section 1962(c) the RICO enterprise must be distinct from the RICO person. See Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), on rehearing, 710 F.2d 1361 (8th Cir.), cert. denied, 104 S.Ct. 527 (1983). With this in view, the Court stated

that in a section 1962(a) action as in a section 1962(c) action plaintiffs must allege and prove a RICO "enterprise" separate and distinct from the RICO "person."

A number of courts have found that the person and enterprise need not be distinct in a section 1962(a) action. See, e.g., B.F. Hirsch, Inc. v. Enright Refining Co., 751 F.2d 628 (3d Cir. 1984); Haroco, Inc. v. American National Bank and Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984); Schreiber Distributing Co. v. Serv-Well Furniture Co., 55 U.S.L.W. 2364-65 (9th Cir. Dec. 24, 1986). Other courts have ruled that the distinction pertains in a section 1962(a) action. United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982); Rush v. Oppenheimer & Co., 628 F.Supp. 1188, 1197 (S.D.N.Y. 1985). The Court continues be of the view that the RICO person and enterprise must be distinct for purposes of a section 1962(a) claim. In addition to the reasons cited in the Court's November 21 order, the Court notes the following:

(1) In the absence of "very explicit statutory language," the courts are not inclined to accept the proposition that a civil RICO defendant could participate with itself in the illicit use or investment of income derived from a pattern of racketeering activity. Computer Sicences Corp., 689 F.2d at 1183.

(2) Because civil RICO was intended to provide a remedy against the infiltrator of legitimate business, and not against the infiltrated enterprise, a separate enterprise-person requirement is appropriate in a 1962(a) action as in a 1962(c) action. Rush, 628 F.Supp. at 1197.

(3) Perhaps most significantly, the construction of section 1962(a) urged by plaintiffs would fly in the face of ongoing efforts by Congress and the courts to curtail the expansive reach of civil RICO.

For these reasons, plaintiffs' motion for reconsideration of the Court's 1962(a) statements is denied.

4. **Filed Rate Doctrine**

In its November 21 order the Court found that the federal "filed rate" doctrine precludes plaintiffs' cause of action. Plaintiffs urge the Court to reconsider its position. Plaintiffs have not, however, cited any new authority or arguments in support of its motion for reconsideration. Accordingly, plaintiffs' motion will be denied.

Based on the foregoing, and upon review of all files, records and proceedings herein,

IT IS ORDERED that plaintiffs' motion for reconsideration is in all respects denied.

/s/
Judge Harry H. MacLaughlin
United States District Court

DATED: February 18, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Plaintiffs,

CIVIL 4-86-546

v.

MEMORANDUM AND ORDER

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants.

Mark Reinhardt, Susan Bedor, Reinhardt & Anderson, 1014 Conwed Tower, 444 Cedar Street, St. Paul, MN 55101, and

John Cochrane, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101, for plaintiffs.

John D. French, John F. Beukema, James L. Volling, Joseph H. Otterstetter, Faegre & Benson, 2300 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, and Stephen T. Refsell, General Attorney, Northwestern Bell Telephone Company, Room 1800, 200 South Fifth Street, Minneapolis, MN 55402, for defendants.

This matter is before the Court on defendant Northwestern Bell Telephone Company's motion to dismiss and/or for summary judgment, and on plaintiffs' motion to strike defenses. Plaintiffs' motion will be denied. Defendant's motion to dismiss will be granted.

FACTS

Plaintiff H.J., Inc. is a Minnesota corporation with its principal place of business in Burnsville, Minnesota. Plaintiffs Kirk Dahl, Mary Krugen, Larry Krugen, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, and Thomas J. Mott are each Minnesota residents. Each of the named plaintiffs has purchased telecommunications goods and services from Northwestern Bell. Defendant Northwestern Bell Telephone Co., a subsidiary of U.S. West, Inc., is a telecommunications concern supplying goods and services in interstate commerce. Defendants Harry Crump, Leo Adams, Barbara Beerhalter, Roger Hanson, and Juanita Satterlee are present or former members of the Minnesota Public Utilities Commission (MPUC). Defendant Robert Johnson is counsel for

the Minnesota Telephone Association. Ray Larson, Roy Weir, Thomas Madison, and Gene Bier are officers and/or employees of Northwestern Bell.

This is a class action arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Plaintiffs allege that defendants committed acts in violation of 18 U.S.C. §§ 1962(a), (b), and (c) and further allege that defendants conspired to commit racketeering acts in violation of 18 U.S.C. § 1962(d). Plaintiffs also bring state law claims pursuant to the Court's pendent jurisdiction, alleging acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and the common law of bribery.

The gist of plaintiffs' cause of action is an allegation that Northwestern Bell, by and through its corporate agents, initiated a scheme designed to illegally influence various members of the MPUC, the regulatory body which sets rates which Northwestern Bell may charge for the goods and services which it provides. Plaintiffs allege that from July, 1980 and through the present, Northwestern Bell has offered, promised, or given, directly or indirectly, certain benefits, rewards, and consideration to duly appointed MPUC commissioners, with the intent to influence said commissioners with respect to the performance of their duties as officers of the MPUC. Amended Complaint ¶ 30. Specifically, plaintiffs allege the following corrupting acts:

(1) MPUC commissioner Hanson negotiated with Northwestern Bell officials including Gene Bier, Northwestern Bell's chief executive officer, regarding an offer of employment made to Hanson by Northwestern Bell in November, 1984, at a time when Hanson was still an MPUC commissioner. Amended Complaint ¶ 37.

(2) MPUC commissioner Hanson received illicit

payments from Northwestern Bell of $30,000 during 1985. The illicit payments were made to Robert Johnson, counsel for the Minnesota Telephone Association, and passed on to Hanson. Amended Complaint ¶ 38. These illicit payments continued after Hanson was reappointed MPUC commissioner on November 25, 1985. Amended Complaint ¶ 39.

(3) Northwestern Bell executives Thomas Madison and Roy Weir made an offer of employment to MPUC commissioner Juanita Satterlee while Satterlee was still a commission member. Amended Complaint ¶ 40.

(4) Northwestern Bell made illicit payments to Satterlee of $106,129 during the period 1983-1984, while Satterlee was an MPUC commissioner. Amended Complaint ¶ 41.

(5) Northwestern Bell officer Larson provided MPUC commissioner Crump with a free plane ride from Oklahoma to Minneapolis on June 26, 1985. Amended Complaint ¶ 31.

(6) MPUC commissioners Crump and Beerhalter were provided with an all-expenses-paid excursion to Canterbury Downs in September, 1985, courtesy of Northwestern Bell. Amended Complaint ¶ 32, 36.

(7) MPUC commissioner Crump was provided with tickets to various Broadway plays by Northwestern Bell officials between 1984 and the present. Amended Complaint ¶ 33.

(8) MPUC commissioners Crump and Adams were provided with free tickets to various sporting events by Northwestern Bell officials during the period 1981 to the present. Amended Complaint ¶ 34, 35.

(9) During the period July, 1980 to the present, Northwestern Bell has expended thousands of dollars for various gifts, emoluments, meals, and parties for MPUC commissioners. Amended Complaint ¶ 42.

Plaintiffs' complaint is in five counts. Count I is a state law claim alleging that the defendants bribed MPUC commissioners by offering to those commissioners benefits, rewards, and consideration to which they were not entitled. Plaintiffs seek civil recovery based on violation of the Minnesota criminal bribery statute, Minn. Stat. § 609.42, subd. 1(1) and (2), and for common law bribery. Count II is a RICO claim arising under section 1962(a). Count III arises under RICO section 1962(b), alleging that the defendants associated with the MPUC in unlawful racketeering activity. Count IV arises under RICO section 1962(c) and Count V is a conspiracy count arising under RICO section 1962(d). Each of the RICO counts involves an allegation that the defendants and the MPUC associated together for the purpose of unlawful racketeering activity.

Plaintiffs seek to recover compensatory damages, measured by the amount received by Northwestern Bell in excess of what would have been a fair and reasonable charge for telephone services. Plaintiffs also seek to recover punitive damages, treble damages pursuant to RICO, 18 U.S.C. § 1984(c), and an injunction prohibiting defendants from engaging in further unlawful activity.[1]

Defendant Northwestern Bell now brings this motion to dismiss and/or for summary judgment. Plaintiffs have filed a counter-motion to strike defenses.

---

[1] The Court was pleased to note that on November 7, 1986 the MPUC voted to reconsider a $57.5 million rate increase granted to Northwestern Bell in 1984. As the Court noted at oral argument, the Commission appears to be an appropriate place to consider whether the alleged briberies and other improper contacts had any effect upon the rate increases granted to Northwestern Bell by the MPUC. The MPUC's decision to reopen the case means that the rate differentiations of which plaintiffs complain could be corrected by an MPUC decision to abrogate the 1984 rate increases. Minneapolis Star & Tribune, November 8, 1986, at 1, col. 4.

DISCUSSION

A. Timeliness

As a threshold matter, plaintiffs argue that defendant's Rule 12(b)(6) motion to dismiss is untimely. Defendant's motion was filed after defendant's answer to plaintiffs' amended complaint. Rule 12(b)(6) provides that a motion to dismiss for failure to state a claim upon which relief can be granted shall be made "before [responsive] pleading if a further pleading is permitted." Fed.R.Civ.P. 12(b)(6) (emphasis added). Rule 12 gives the defendant the option of raising a defense by motion or by the pleadings, however. Courts have discretion to allow 12(b)(6) motions if the defense has been previously included in the answer. 5 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1361 at 643 n.35. Here, defendant raised its defenses in its answer. In the exercise of the Court's discretion the defendant will be permitted to bring a Rule 12(b)(6) motion at this time.

B. Motion to Strike Defenses

Plaintiffs have brought a motion to strike defendants' third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, and twelfth defenses. Plaintiffs' motion is brought pursuant to Fed.R.Civ.P. 12(f) which provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Fed.R.Civ.P. 12(f). A Rule 12(f) motion to strike defenses is a drastic remedy which is disfavored by the courts and is infrequently granted. Vernon J. Rockler & Co. v. Minneapolis Shareholders Co., 69 F.R.D. 1, 5 (D.Minn. 1975). A Rule 12(f) motion to strike

will be granted only where the Court is convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed. Carter-Wallace, Inc. v. Riverton Laboratories, Inc., 47 F.R.D. 366, 368 (S.D.N.Y. 1969).

Plaintiffs have failed to show that the "drastic remedy" of striking defendants' defenses is appropriate in the case at bar. Each of the challenged defenses is facially valid. Accordingly, plaintiffs' Rule 12(f) motion to strike defenses will be denied.

C. RICO

In order to establish a RICO cause of action plaintiffs must prove the existence of four elements:

(1) conduct
(2) of an enterprise
(3) through a pattern
(4) of racketeering activity.

See Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275, 3285 (1985) (footnote omitted); Simon v. Fribourg, CIVIL 4-86-259, slip op. at 9 (D.Minn. Aug. 20, 1986). Defendant moves to dismiss plaintiffs' RICO claim on the ground that plaintiffs have failed to allege a "pattern" of racketeering activity.

1. "Pattern" of Racketeering Activity

An essential element of the RICO civil cause of action is proof that defendants have engaged in a "pattern" of racketeering activity. The "pattern" requirement was subjected to a searching analysis in the Supreme Court's Sedima decision. The Sedima Court enunciated the following guiding principles:

(1) two isolated acts of racketeering activity do not constitute a pattern;

(2) it is the factors of continuity plus relationship which combine to produce a pattern;

(3) the "pattern" element of the statute was designed to limit RICO's application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes.

See Sedima, 105 S.Ct. at 3285 n.14.[2]

The United States Court of Appeals for the Eighth Circuit has explored the meaning of "pattern" in a civil RICO context in two recent cases, Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th

---

[2] The Sedima Court made the following observations:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "requires at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S.Rep. No. 91-617, p 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). See also id., at 35193 (statement of Rep. Poff) (RICO "not-aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e) 18 USCS § 3575(e). This language may be useful in interpreting other sections of the Act.

Sedima, 105 S.Ct. at 3285 n.14.

Cir. 1986) and Holmberg v. Morrisette, CIVIL Nos. 85-5138 and 85-5221 slip op. (8th Cir. Sept. 3, 1986). In Superior Oil, the plaintiff proved several related acts of mail and wire fraud in furtherance of a single crime -- the conversion or theft of gas from plaintiff's pipeline. The Eighth Circuit found that plaintiff had satisfied the "relationship" prong of the Sedima test, but not the "continuity" prong. The Eighth Circuit explained that proof of a "pattern" of racketeering activity requires more than proof of one racketeering activity and the threat of continuing activity. It is the factor of "continuity plus relationship" which combines to produce a pattern. The court found that proof of a single fraudulent scheme, implemented by several fraudulent acts, does not constitute a "pattern" of racketeering activity for RICO purposes. While the "relationship" prong of the pattern test is met by proof of several related acts of mail and wire fraud, in the absence of proof that the defendants "had ever done these activities in the past . . . [or] that they were engaged in other criminal activities elsewhere," Superior Oil, 785 F.2d at 257, it could not be said that plaintiffs had proved "continuity" sufficient to establish their RICO claims. The court concluded:

> [Plaintiff] has, however, failed to prove the "continuity" sufficient to form a "pattern of racketeering activity." The actions of [defendants] comprised one continuing scheme to convert gas from [plaintiff's] pipeline . . . . On the facts of this case, we agree with the court's conclusion in Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F.Supp. 828, 832 (D.C.Ill. 1985), that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. * * * It places a real strain on the language to speak of a single fraudulent effort, implemented by several

fraudulent acts, as a "pattern of racketeering activity." Superior Oil, 785 F.2d at 257 (footnote omitted).

In Holmberg[3] plaintiff offered proof of several acts of wire or mail fraud related to a common purpose or scheme. The Eighth Circuit found that plaintiff had satisfied the "relationship" prong of Sedima. As in Superior Oil, however, the Court found that plaintiff had not satisfied the "continuity" prong. Because defendants' acts of wire and mail fraud were undertaken as part of a common purpose or scheme, there was no showing of continuity, notwithstanding that the single fraudulent effort was implemented by several acts of wire or mail fraud. The court stated: "[t]here was no evidence that [the defendants] had engaged in like activities in the past or that they were engaged in other criminal activities." Holmberg, slip op. at 9. In the absence of proof of like past or other present fraudulent activity, plaintiffs' civil RICO cause of action was dismissed.

Distilled to their essence, Sedima, Superior Oil, and Holmberg give rise to the following governing principles. In order to establish a "pattern" of racketeering activity plaintiffs must allege and prove (1) relationship, and (2) continuity. The relationship

---

[3] In Holmberg the Eighth Circuit cited definitions of "pattern" drawn from the Omnibus Crime Control Act of 1970, 18 U.S.C. § 3575(e), wherein Congress provided that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." The Holmberg court also looked to legislative history for guidance, citing the following definition of "pattern" drawn from Senate reports:

> The concept of "pattern" is essential to the operation of the statute. . .. The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

Holmberg, slip op. at 9, quoting S.Rep.No. 617, 91st Cong. 2d Sess. 158 (1969).

prong is satisfied by proof of several related acts in furtherance of a single criminal scheme. Superior Oil, 785 F.2d at 257; Louisiana Power and Light Co. v. United Gas Pipe Line Co., CIVIL No. 84-5156, slip op. at 51 (E.D.La. Aug. 15, 1986); Frankart Distributors, Inc. v. RMR Advertising, Inc., 632 F.Supp. 1198 (S.D.N.Y. 1986); Simon, slip op. at 10. The continuity prong is satisfied by proof that the defendants have committed the same or similar racketeering activities in the past or are engaged in other criminal activities elsewhere. Superior Oil, 785 F.2d at 257; Holmberg, slip op. at 9-10.[4]

Applying these principles to the case at bar, it is clear that plaintiffs have satisfied the first prong of the Sedima "pattern" test. Plaintiffs have alleged a "relationship" among and between the predicate acts of racketeering allegedly committed by defendants. Quite clearly, the acts allegedly committed by defendants -- the

---

[4] See, e.g., Simon v. Fribourg, CIVIL No. 4-86-259, slip op. at 9-10 (D.Minn. Aug. 20, 1986) wherein the court declared:

> "[P]roof of a 'pattern of racketeering activity' 'requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is the factor of continuity plus relationship which combines to produce a pattern.'" Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986) (emphasis in original) (quoting Sedima, 105 S. Ct. at 3275 n. 14). In Superior Oil, the plaintiff proved "several related acts of mail and wire fraud" in furtherance of a single crime - the conversion or theft of gas from plaintiff's pipeline. This satisfied the "relationship" prong of the Sedima test, but not the "continuity" prong. The failing in plaintiff's evidence was its inability to demonstrate that defendants had engaged in any other criminal activity. Superior Oil, 785 F.2d at 257.

Simon, slip op. at 9-10. In Simon the court found that plaintiff had failed to allege a civil RICO claim because the racketeering acts alleged by plaintiff were "all committed in furtherance of a single criminal act." Simon, slip op. at 10. In the absence of proof that the defendants had "concocted a similar scheme in any other year or that they were otherwise involved in any criminal activity" plaintiff's RICO claims must fail, the court found. Simon, slip op. at 10.

alleged illicit distribution of tickets and other amenities to MPUC commissioners during the period 1981 to the present; uncompensated plane rides and excursions to Canterbury Downs during the same period; alleged illicit payments and promises of employment to MPUC commissioners Hanson and Satterlee -- were related acts in furtherance of a single alleged criminal scheme, i.e., all were designed to influence MPUC commissioners on behalf of Northwestern Bell.

As to the "continuity" prong of the Sedima test, however, plaintiffs' cause of action is much more problematical. While plaintiffs have alleged the existence of several fraudulent acts, each of these acts was committed in furtherance of a single fraudulent scheme. Here, as in Superior Oil, Holmberg, and Simon, there simply are no allegations that the defendants have engaged in "like activities in the past" or that defendants are engaged in "other criminal activities" elsewhere. Superior Oil, 785 F.2d at 257; Holmberg, slip op. at 10; Simon, slip op. at 10. The Superior Oil-Holmberg construction of the Sedima "pattern" test is extremely restrictive -- in order to establish a pattern of racketeering activity plaintiffs must allege and prove multiple illegal schemes, of which the case at bar presents a separable episode. Each of the fraudulent acts alleged by plaintiffs was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. Plaintiffs do not allege that the defendants have engaged in like wrongful activity in the past or are engaged in other wrongful activity elsewhere. See Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F.Supp. 828, 832 (N.D. Ill. 1985) (the common sense interpretation of "pattern" implies acts occurring in different criminal episodes, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity). Absent

allegations of separable criminal episodes, plaintiffs' cause of action simply does not fit the RICO paradigm -- the infiltration of legitimate business by criminal conduct which embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. It is apparent that plaintiffs have attempted to splinter a series of related acts into a civil RICO cause of action. Professional Assets Management, Inc. v. Penn Square Bank, N.A., 616 F.Supp. 1418, 1423 (W.D.Okla. 1985). As such, plaintiffs' allegations fall short of establishing a "pattern" within the meaning of the RICO statue. Here, as in Superior Oil and Holmberg, "[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'" Superior Oil, 785 F.2d at 257; Holmberg, slip op. at 10. See, e.g. Allington v. Carpenter, 619 F. Supp. 474 (C.D.Cal. 1985) (three acts of wire fraud in connection with a single isolated fraudulent scheme comprised a single criminal episode rather than a "pattern" of racketeering activity); Morgan v. Bank of Waukegan, 615 F.Supp. 836, 838 (N.D. Ill. 1985) (single plot spread over several years does not satisfy the pattern requirement); Cullen v. Nassau County Republican Committee, II RICO Law Rptr. 564 (E.D.N.Y. 1985) (to establish pattern plaintiffs must show that crimes constituted part of a larger pattern of criminal activity); Exeter Towers Associates v. Bowditch, 604 F.Supp. 1547 (D.Mass 1985) (two acts of mail fraud in connection with the purchase of a single mortgage does not constitute a pattern); Teleprompter of Erie, Inc. v. City of Erie, 537 F. Supp. 6 (W.D.Pa. 1981) (multiple bribes received by councilman at a political fundraiser did not constitute a pattern).

Plaintiffs cite various decisions of other courts in other

circuits where proof of various predicate acts engaged in over a significant period of time has been held to satisfy the "pattern" requirement of civil civil RICO.[5] See Illinois Dept. of Revenue v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985) (defendants' act of mailing nine fraudulent tax returns over a nine-month period constitutes pattern of racketeering); First Federal Savings and Loan Association of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 629 F. Supp. 427, 445 (S.D.N.Y. 1986) (predicate mail fraud acts arising out of a single scheme constitute pattern); Pappagiannis v. Pontikis, 105 F.R.D. 177 (N.D.I11. 1985) (perpetration of fraud on more than one victim constitutes pattern); United States v. Freshie Co., 639 F.Supp. 442 (E.D.Pa. 1986) (related but distinct methods of criminal activity engaged in over a substantial period of time rose to the level of a pattern of racketeering activity). Were the Court writing on a clean slate, these cases might well be persuasive. In the Eighth Circuit, however, the slate is far from clean.[6]

---

[5] In a recent decision, Morgan v. Bank of Waukegan, 55 U.S. L.W. 2255 (7th Cir. Oct. 23, 1986), the United States Court of Appeals for the Seventh Circuit noted that the "continuity" aspect of the pattern requirement in the aftermath of Sedima footnote 14 has created a conflict among the circuits. The Eleventh Circuit has rejected the proposition that the predicate acts must occur in different criminal episodes or schemes, Bank of America v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986), while in contrast the Eighth Circuit has held that where all predicate acts were committed in furtherance of a single scheme the continuity requirement has not been met, as discussed above. In Morgan the Seventh Circuit elected to steer the middle ground, holding that "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., 'transactions' somewhat separated in time and place." . . . .

[6] One court has identified three positions which the courts have taken in construing the continuity and relationship test. At one extreme, plaintiff is required to prove that the defendant was engaged in multiple illegal schemes. This is the position taken by the Eighth Circuit in Superior Oil and Holmberg.

Superior Oil and Holmberg are on all fours with the instant case. Under Superior Oil and Holmberg, plaintiffs have failed to show the requisite "continuity." Accordingly, plaintiffs' RICO claims must be dismissed.

Although plaintiffs' failure to satisfy the continuity prong of the Sedima pattern test is fully dispositive of plaintiffs' RICO claims in the interest of thoroughness, certain of defendant's remaining arguments for dismissal will be briefly addressed.

2. Enterprise-Person Distinction

RICO was passed as part of the Organized Crime Control Act. United States v. Hartley, 678 F.2d 961, 987 (11th Cir. 1982). Its primary purpose was "to eradicate organized crime and corruption." United States v. Lee Stroller Enterprises, Inc., 652 F.2d 1313, 1317 (7th Cir. 1981). In United States v. Turkette, 452 U.S. 576 (1981), the United States Supreme Court interpreted RICO as requiring proof of an "enterprise" engaged in a "pattern of racketeering activity." 452 U.S. at 583. "Enterprise" as defined in 18 U.S.C. § 1961(4) "includes any partnership, corporation, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity." Under Turkette, the existence of such an enterprise must be established by "evidence that the various associates function as a continuing unit." Turkette, 452 U.S. at 583. Moreover, the enterprise must be shown to have an existence "separate and apart from the pattern of activity in which it engages." Turkette, 452 U.S. at 583; Bennet v. E.F. Hutton, Inc., 597 F.Supp. 1547, 1559 (N.D.Ohio 1984).

Defendant moves for dismissal of plaintiffs' Count II on

At the other extreme, courts have held that allegations of two related predicate acts is sufficient. An intermediate position taken by some courts requires proof of multiple criminal episodes evincing an ongoing practice or activity. See Louisiana Power and Light, slip op. at 52-53.

the ground that Count II names Northwestern Bell as both the "person" and the "enterprise" for purposes of plaintiffs' section 1962(a) claim. Defendant argues that Northwestern Bell cannot be both the "person" and the "enterprise" and that Count II is thus fatally defective.

RICO proscribes conduct in which one party, the "person" subject to the statute, acts upon an entity, the "enterprise," in such a manner that the enterprise's affairs are conducted through a pattern of racketeering. Bennett v. Berg, 685 F.2d 1053, 1061 (8th Cir. 1982). While some courts have held that a legal entity or formal enterprise which has actively participated and benefitted from a pattern of racketeering activity can be named as both the enterprise and the person, see United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), the majority position, and the one adopted in this circuit and district, is that the RICO "enterprise" cannot also be the RICO "person." See Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984); United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982). In Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), the Eighth Circuit dismissed one count of plaintiff's complaint for failure to draw a distinction between the RICO enterprise and the RICO person. The Bennett ruling was reaffirmed in Alexander Grant & Co. v. Tiffany Industries, Inc., 742 F.2d 408, 411 n.6 (8th Cir. 1984), vacated on other grounds and remanded for reconsideration in light of Sedima, 105 S.Ct. 3550 (1985), on remand 770 F.2d 717 (1985), where the court stated:

> We do observe that [plaintiff's] original complaint alleges that [defendant] is both a "person" and an "enterprise" within the meaning of section 1962(c). It was precisely because of the possibility of such an identity that we held that count II of the complaint in

Bennett v. Berg [citation omitted] failed to state a claim.

In Minnesota Odd Fellows Home Foundation v. Engler & Budd Co., 630 F.Supp. 797 (D.Minn. 1986), the court found that "in the Eighth Circuit, it is necessary to allege an 'enterprise' separate from the 'person' who allegedly associates with the enterprise." Odd Fellows, 630 F.Supp. at 800, citing Bennett v. Berg, 685 F.2d at 1089. Because plaintiff in that case had failed to allege the existence of an "enterprise" separate and distinct from the "person" associated with the enterprise, the court dismissed plaintiff's RICO claims.

Plaintiffs' Count II alleges:

> 48. Northwestern Bell Telephone Company is a person within the meaning of 18 U.S.C. 1961(3).
>
> 49. The person referred to in paragraph 48 is also an ongoing enterprise within the meaning of 18 U.S.C. 1961(4).

Amended Complaint ¶¶ 48, 49. Quite clearly, plaintiffs have failed to allege a RICO "enterprise" separate and distinct from a RICO "person." Plaintiffs argue, however, that Bennett is not controlling in that the Bennett plaintiff's cause of action arose under section 1962(c) of RICO, whereas plaintiffs' Count II arises under section 1962(a). Some courts have held that in actions arising under section 1962(a) the enterprise and the person need not be distinct. See, e.g., B.F. Hirsch v. Enright Refining Co., 751 F.2d 628 (3d Cir. 1984); United States v. Freshie Co., 639 F.Supp. 442 (E.D.Pa. 1986). Other courts have held that the person-enterprise distinction pertains to 1962(a) actions as well as 1962(c) actions. See, e.g., Kredietbank, N.V. v. Joyce Morris, Inc., CIVIL No. 84-1903 (D.N.J. Jan. 9, 1986); Rush v. Oppenheimer & Co., 628 F.Supp. 1188, 1196-98 (S.D.N.Y. 1985); Computer Sciences, 689 F.2d at

1190. The Court finds that in a 1962(a) action, as in a 1962(c) action, plaintiff must allege the existence of an "enterprise" separate and distinct from the "person" identified, for the following reasons:

(1) Both 1962(a) and 1962(c) speak[7] of a "person" committing an unlawful act in connection with, but distinct from, an "enterprise." The consistent use of the two different terms "person" and "enterprise" throughout section 1962 indicates an intent to distinguish those actors throughout.

(2) As stated in Bennett v. Berg, "the RICO act proscribes conduct in which one party, the 'person' subject to the statute, acts upon an entity, the 'enterprise' . . . ." Bennett, 685 F.2d at 1061. In making this statement, the Eighth Circuit did not distinguish between (a) and (c) of section 1962, and nothing in Bennett gives rise to an inference that the court would view section

---

[7] RICO section 1962(a) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . in which such person has participated as a principal, within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

The thrust of section 1962(a) is a proscription on the use or investment of illegally acquired funds in an, enterprise.

RICO, section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The thrust of section 1962(c) is wrongful association with and control of an "enterprise" by a "person."

(a) differently from section (c) for purposes of the separate person-enterprise requirement. Absent proof of a "person' acting upon an "enterprise," RICO is inapplicable, by virtue of the plain language of Bennett.

(3) Permitting a RICO cause of action where it is alleged that a corporate entity has conducted its own affairs through a pattern of racketeering activity, without any proof of infiltration of that enterprise by outside "persons," would not comport with congressional intention, inasmuch as one of the primary purposes of Congress in enacting RICO was to prevent the takeover of legitimate business by criminals and corrupt organizations. B.F. Hirsch, 751 F.2d at 633.

(4) Sections (a) and (c) of 1962 require the presence of the same elements -- conduct of an enterprise, a pattern of racketeering activity, and a person. Only the relationship among these elements differs. Section (c) envisions racketeering acts conducted through an enterprise, whereas section (a) portrays the enterprise as the investment object of the criminal violators. Under either (a) or (c), the enterprise must be acted upon by a distinct "person."

(5) A construction of (a) which would obviate the separate enterprise-person requirement would be contrary to the restrictive reading of RICO given by the Eighth Circuit in Superior Oil and Holmberg and would "aggravate the already hopeless deviation of the RICO statute from its intended purpose in ferreting out organized crime." Rush v. Oppenheimer & Co., 628 F.Supp. 1188, 1197 (S.D.N.Y. 1985).

Accordingly, based on the foregoing, the Court finds that plaintiffs' Count II is deficient as a matter of law.

D. Filed Rate Doctrine

Northwestern Bell argues that dismissal of plaintiffs' RICO

claims is necessitated by the federal "filed rate" doctrine. In Montana-Dakota Utilities Co v. Northwestern Public Service Co., 341 U.S. 246 (1951), the Supreme Court affirmed the district court's dismissal of an action predicated on allegations that plaintiffs were forced to pay unreasonably high rates due to misrepresentations made by the defendant in rate proceedings before the Federal Power Commission (FPC). The Supreme Court held that the FPC had exclusive authority to determine a reasonable rate, and that the FPC's decision was conclusive. In Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981), the Supreme Court reversed the trial court's award of damages measured by the difference between the price defendant had paid to plaintiff pursuant to Federal Energy Regulatory Commission (FERC) approved rates and the price defendant had paid others. The Court held that the "filed rate" doctrine forbids an award of damages based on an estimation of what the FERC "might have done had it been faced with the facts of [the] case." Arkansas Gas, 453 U.S. at 578-79. Northwestern Bell also relies on a line of federal antitrust cases, wherein the courts have held that antitrust plaintiffs are precluded from obtaining damages based on alleged illegal price fixing of utility rates, where the alleged damages are measurable by a comparison of the approved tariff and the tariff that would have been approved absent defendant's wrongdoing. See Keough v. Chicago & Northwestern Ry., 260 U.S. 156, 163 (1922); Square D Co. v. Niagra Frontier Tariff Bureau, Inc. 106 S.Ct. 1922 (1986). Northwestern Bell argues that the Keough line of antitrust cases has relevance to a RICO action because (1) both RICO and the Clayton Act grant a cause of action to one "injured in his business or property," and because (2) both RICO and the Clayton Act provide for the award of treble damages. Defendant argues that the analogous nature of the Clayton Act and RICO

remedies make the Keough line of cases of valid precedential authority in a RICO case.

Montana-Dakota, Arkansas Gas, and the Keough line of cases are squarely on point with plaintiffs' RICO claims. Plaintiffs seek to recover damages measurable by a comparison of MPUC-approved rates and the rates that would have been approved but for defendants' wrongdoing. Under the "filed rate" doctrine, plaintiffs' cause of action is not federally cognizable. The MPUC has exclusive authority to determine a reasonable rate, and the MPUC's decision is conclusive, subject to statutory process. Even assuming that plaintiffs have satisfied the "continuity" prong of Sedima, plaintiffs' action must be dismissed by virtue of the filed rate doctrine.

E. State Law Claims

Plaintiffs' Count I is a state law claim arising under Minn. Stat. § 609.42 and the common law of bribery. In United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), the seminal case on the pendent jurisdiction of the federal courts, the United States Supreme Court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726. This bold statement has been subsequently qualified somewhat, the Court stating in Rosado v. Wyman, 397 U.S. 397 (1970) that whether to proceed with state claims lacking an independent basis of federal jurisdiction after all federal claims have been dismissed is discretionary with the trial court. 397 U.S. at 404; Silva v. Vowell, 621 F.2d 640 (5th Cir. 1980); McGann v. Mungo, 578 F.Supp. 1413 (D.S.C. 1982). Factors to consider in the exercise of the Court's discretion include considerations of judicial economy, convenience and fairness to litigants, and the avoidance of needless decisions of state law. Gibbs, 383 U.S. at 726. Reyes

v. Edmunds, 416 F.Supp. 649 (D.Minn. 1976). See also Koke v. Stifel, Nicolaus & Co., 620 F.2d 1340, 1346 (8th Cir. 1980) (adopting Gibbs factors); Pink Supply Corp. v. Hiebert, Inc., 612 F.Supp. 1334, 1347 (D.Minn. 1985).

Each of the relevant factors supports dismissal of plaintiffs' pendent state law claims. The case is still at an early stage, so that there has been no substantial commitment of federal judicial resources. See, e.g., Briggs v. American Air Filter Co., 455 F.Supp. 179 (N.D.Ga. 1978) (no substantial commitment of judicial resources to nonremovable claims); Houlihan v. Anderson Stokes, Inc., 434 F.Supp. 1324, 1329 (D.D.C. 1977) (federal claims dismissed at early stage). Count I of the amended complaint raises an issue of first impression as to the implication of a private cause of action under the Minnesota criminal bribery statute. Needless decision of this unsettled state law issue is best avoided. Girard v. 94th Street & Fifth Ave. Corp., 530 F.2d 66 (2d Cir.), cert. denied, 425 U.S. 974 (1976); Briggs, 455 F.Supp. at 82 (novel questions of state law). In sum, no "unusual circumstances," Nolan v. Meyer, 520 F.2d 1276, 1280 (2d Cir.), cert. denied, 423 U.S. 1034 (1975), justifying federal jurisdiction over the pendent state claims are present here. Consequently, plaintiffs' Count I will be dismissed without prejudice as outside the subject matter jurisdiction of the Court. See Kuhn v. National Association of Letter Carriers, Branch 5, 570 F.2d 757, 761 (8th Cir. 1978) (district court did not have power to consider pendent state claim because it did not have jurisdiction over the federal claim).

Based on the foregoing, and upon all the files, records, and proceedings in this matter,

IT IS ORDERED that:

1. plaintiffs' motion to strike defenses is denied;
2. defendant's motion to dismiss Counts II-V of

plaintiffs' amended complaint is granted; and

3. defendant's motion to dismiss Count I of plaintiffs' amended complaint is granted, and Count I is dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/
Judge Harry H. MacLaughlin
United States District Court

DATED: November 21, 1986

FILED
MAY 8 1992
OFFICE OF THE CLERK

(2)

No. 91-1653

In The
Supreme Court of the United States
October Term, 1991

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN, and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Stephen T. Refsell
Chief Counsel - B.G.S.
US WEST Communications, Inc.
150 South Fifth Street
Suite 3000
Minneapolis, Minnesota 55402
(612) 663-5689

FAEGRE & BENSON
John D. French
(*Counsel of Record*)
John F. Beukema
James L. Volling
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 336-3000

Counsel for Respondent
Northwestern Bell Telephone Company

1992-EXECUTEAM / LAW DIV., 2595 N. Hamline Ave., St. Paul, MN 55113 • 612/633-1443 • 800/747-8793

QUESTION PRESENTED

Whether the filed rate doctrine announced in cases such as *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), and *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), applies to claims for damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c).

PARTIES TO THE PROCEEDING

The caption identifies all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit, whose judgment is sought to be reviewed. Northwestern Bell Telephone Company, on whose behalf this brief is submitted, became known as US West Communications, Inc. as of January 1, 1990. It is a wholly-owned subsidiary of US West Markets Group, Inc., which is a wholly-owned subsidiary of US West, Inc. US West Communications, Inc. has no subsidiaries. US West NewVector Group, Inc. is the only less-than-wholly-owned subsidiary of US West, Inc.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Restatement of the Case 2

A. Proceedings and Disposition Below 2
B. Related Proceedings 5
C. Factual Allegations 7

Reasons for Denying the Writ

I. The Court Of Appeals Correctly Held That Petitioners' Claim For Damages Is Barred By The Filed Rate Doctrine As Articulated By This Court 8

II. This Case Presents No Conflict Among the Circuits 11

III. This Case Does Not Conflict With This Court's Prior RICO Decisions 13

Appendix: *Taffet v. Southern Co.*, No. 90-7088 (11th-Cir. April 10, 1992) (order vacating panel decision and directing rehearing *en banc*) A-1

TABLE OF AUTHORITIES

CASES — PAGE

Agency Holding Corp. v. Malley-Duff & Associates,
483 U.S. 143 (1987) 14

Arkansas Louisiana Gas Co. v. Hall,
453 U.S. 571 (1981) 9

Carr v. Southern Co., 731 F.Supp. 1067
(S.D. Ga. 1990) 12

County of Suffolk v. Long Island Lighting Co.,
907 F.2d 1295 (2d Cir. 1990) 11, 12

H.J. Inc. v. Northwestern Bell Corp.,
420 N.W.2d 673 (Minn. App.),
rev'w denied (Minn. 1988) 5

H.J. Inc. v. Northwestern Bell Telephone Co.,
492 U.S. 229 (1989) 2, 4, 13

H.J. Inc. v. Northwestern Bell Telephone Co.,
829 F.2d 648 (8th Cir. 1987) 3

H.J. Inc. v. Northwestern Bell Telephone Co.,
954 F.2d 485 (8th Cir. 1992) 4, 11, 12, 13

H.J. Inc. v. Northwestern Bell Telephone Co.,
648 F.Supp. 419 (D. Minn. 1986) 3

H.J. Inc. v. Northwestern Bell Telephone Co.,
653 F.Supp. 908 (D. Minn. 1987) 3

H.J. Inc. v. Northwestern Bell Telephone Co.,
734 F.Supp. 879 (D. Minn. 1990) 4, 11

Holmes v. Securities Investor Protection Corp.,
112 S. Ct. 1311, 60 U.S.L.W. 4225 (U.S. 1992) 14, 15

Keogh v. Chicago & Northwestern Ry.,
260 U.S. 156 (1922) 9, 16

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. ___, 110 S. Ct. 2759 (1990) 9

Matter of Minnesota Public Utilities Comm'n,
417 N.W.2d 274 (Minn. App. 1987), *cert. denied*, 488 U.S. 849 (1988) 7

McCray v. New York, 461 U.S. 961 (1983) 13

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) 9

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985) 14

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) 9, 10, 16

State of Minnesota v. Northwestern Bell Telephone Co., Civil File C8-87-487340
(Ramsey Cty., Minn., Dist. Ct.) 7

Taffet v. Southern Co., 930 F.2d 847
(11th Cir. 1991), *vacated*, No. 90-7088
(11th Cir. April 10, 1992) 11

Taffet v. Southern Co., No. 89-V-712-N, 1990
U.S. Dist. LEXIS 4189 (M.D. Ala. Jan. 5, 1990) 12

United States v. Turkette, 452 U.S. 576 (1981) 14

STATUES AND RULES

Minn. Stat. § 237.26 5

Minn. Stat. § 609.42 2

Sup. Ct. Rule 10.1(a) 12

15 U.S.C. § 15 ..... 14, 15

18 U.S.C. §§ 1961-68 2

18 U.S.C. § 1962(a) 3, 4

18 U.S.C. § 1962(b) 4

18 U.S.C. § 1962(c) 4

18 U.S.C. § 1964(c) 14

OTHERS

Minneapolis Star Tribune, Feb. 26, 1987,
at 1A, 9A 6

No. 91-1653

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

H.J. INC., a Minnesota corporation,
KIRK DAHL, LARRY KRUGEN and MARY KRUGEN,
individually and d/b/a/ PHOTO IMAGES, SUSAN DAVIS,
ROBERT NEAL, ISAAC H. WARD, RICHARD L.
ANDERSON, THOMAS J. MOTT, and
all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY,
a subsidiary of U.S. West, A.B.C. individually and
D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESTATEMENT OF THE CASE

A. Proceedings and Disposition Below

The petition seeks to bring this action before this Court for a second time. In 1989, the Court held that the facts alleged in the amended complaint, if proven, would constitute a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Upon remand, the district court reaffirmed its previous ruling (not considered in the first appeal) that petitioners' claim for damages is barred by the filed rate doctrine and dismissed the complaint. The court of appeals affirmed, and petitioners ask this Court again to resurrect their claim.

This action was commenced in the United States District Court for the District of Minnesota in July 1986 on behalf of a purported plaintiff class of all purchasers of "telecommunications goods and services" from respondent Northwestern Bell Telephone Company ("Northwestern Bell") between 1980 and 1986. Petitioners allege that Northwestern Bell engaged in dealings with members of the Minnesota Public Utilities Commission ("the MPUC") that constitute bribery in violation of the Minnesota criminal bribery statute, Minn. Stat. § 609.42. They claim a right of action for damages on account of this alleged activity both directly under the Minnesota statute and on the theory that, because of the alleged bribery, respondent has violated several provisions of RICO. In a single allegation applicable to both legal theories, petitioners claim that the alleged violations injured all members of the purported class in that the rates each of them was required to pay for respondent's services pursuant to orders of the MPUC exceeded the rates that were "fair and reasonable"; they ask the

district court to determine what are "fair and reasonable" rates and award them as damages their payments in excess of those court-determined rates. Amended Complaint, ¶ 75.

Northwestern Bell filed an answer denying that it had violated any law in its dealings with the MPUC. It then moved to dismiss all or various parts of the complaint on a number of different grounds.

By Order dated November 21, 1986, the district court, by the Honorable Harry H. MacLaughlin, granted Northwestern Bell's motion, holding: (1) that the facts alleged in the complaint do not constitute a "pattern of racketeering activity" under RICO; (2) that petitioners' allegation under section 1962(a) of RICO fail to state a claim, in that Northwestern Bell is alleged to be both the "person" and the "enterprise" under that section; and (3) that, even if petitioners adequately allege violations of RICO, their claims under that statute are barred by the filed rate doctrine, in that they seek to have the court establish that the "reasonable" rates for Northwestern Bell's services were something other than the rates promulgated by the MPUC. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 648 F. Supp. 419 (D. Minn. 1986). Accordingly, the court dismissed petitioners' RICO claims with prejudice. Petitioners' motion to "alter or amend," *i.e.* reconsider, the judgment of dismissal was denied by Order dated February 18, 1987. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 653 F. Supp. 908 (D. Minn. 1987).

The court of appeals affirmed the judgment of the district court. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987). In doing so, it considered only the issue of RICO "pattern" and did not address the other bases for the district court's ruling. This Court reversed the court of appeals' judgment on "pattern" grounds and remanded the case for further proceedings,

explicitly noting that it did not consider the other grounds on which the district court had relied in dismissing the action. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 234 n.1 (1989). Rather than address those issues immediately upon remand, the court of appeals returned the case to the district court to give it the opportunity to reconsider its 1986 ruling in light of this Court's opinion and other intervening developments. Order, No. 87-5121 (8th Cir. Oct. 30, 1989).

When the case returned to the district court, Northwestern Bell renewed its motion for dismissal, both on the grounds on which the court had previously ruled and on grounds that had not been reached in the 1986 ruling. By Memorandum and Order dated April 4, 1990, Judge MacLaughlin again ordered that the complaint be dismissed. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 734 F. Supp. 879 (D. Minn. 1990). The court reaffirmed its 1986 ruling that petitioners' claims are barred by the filed rate doctrine. It also held that petitioners' state law claim is barred by the judgment in a parallel action in Minnesota state court (*see* p.5, *infra*).[1]

Petitioners again appealed, and the court of appeals again affirmed. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485 (8th Cir. 1992). The court of appeals' judgment is dated January 15, 1992. The present petition was filed on April 14, 1992.

---

[1] The district court did not reach numerous other grounds for dismissal urged by Northwestern Bell, including contentions that RICO is unconstitutionally vague; that Northwestern Bell does not have the necessary "interest in or control of" the MPUC within the meaning of 18 U.S.C. § 1962(b); and that Northwestern Bell is not "employed by or associated with" the MPUC within the meaning of 18 U.S.C. § 1962(c). It also did not readdress its 1986 ruling that Northwestern Bell cannot be both a "person" and an "enterprise" for purposes of 18 U.S.C. § 1962(a).

B. Related Proceedings

During the nearly six years that this action has been pending in federal court, there have been other proceedings in other forums based on the same facts as are alleged here, the results of which are relevant to the present petition.

First, petitioners commenced a parallel action in Minnesota state court shortly after the original decision of the district court in 1986. The factual allegations and legal theories in that action were identical to those of the amended complaint here, except that petitioners asserted a claim for "unjust enrichment" in addition to their bribery- and RICO-based claims. The state action was dismissed in June 1987, and the Minnesota Court of Appeals affirmed that dismissal in March 1988, holding: (1) that there is no private right of action under either Minnesota statutory or common law for damages caused by alleged bribery of public officials; (2) that petitioners' RICO claims were barred, pursuant to the doctrine of *res judicata*, by the final judgment of dismissal in this case (which had been affirmed by the Eighth Circuit and on which this Court had not yet granted review); and (3) that petitioners' "unjust enrichment" claim, being a collateral attack on a ratemaking decision of the MPUC, was barred by Minn. Stat. § 237.26. *H.J. Inc. v. Northwestern Bell Corp.*, 420 N.W.2d 673 (Minn. App.), *rev'w denied* (Minn. 1988).

Another related action was an administrative proceeding by the MPUC itself. When the allegations on which the amended complaint rests first became publicly known early in 1986, the Minnesota Department of Public Service and the Attorney General of Minnesota requested that the MPUC reconsider various of its prior decisions affecting Northwestern Bell that allegedly had been "tainted" by the company's supposedly improper activities. These included virtually all MPUC decisions that conceivably could be

at issue in the instant action. In an Order dated April 2, 1987, the MPUC found no evidence of criminal wrongdoing.[2] It also found that most of the matters on which redeliberation was sought had not been affected by Northwestern Bell's alleged conduct and did not need to be reexamined. However, the MPUC did find that its decision in a matter known as Docket 83-600, which had originally been issued in July 1984 and on which all appeals had been completed, involved the "appearance of impropriety," so that the proceeding should be reopened and the 1984 decision redeliberated. In ordering this redeliberation, the MPUC did not find that any particular vote in the prior proceeding had been improperly influenced, but only that a review of the entire record on a *de novo* basis would clear the air of any concern as to past impropriety.

The results of the redeliberation were announced by Order dated April 3, 1987, approving a new schedule of rates that, for a variety of complex, regulatory policy-based reasons, was lower than the rate schedule the MPUC had first approved in 1984. Northwestern Bell was ordered to adjust its *prospective* rates accordingly. After limited additional proceedings in the MPUC, Northwestern Bell implemented new rates, effective May 17, 1987, that are approximately $9 million per year lower than the rates that were in effect when the case at bar was commenced. The MPUC's

---

[2] In so finding, the MPUC reached the same conclusion as a Ramsey County, Minnesota, grand jury that heard evidence concerning Northwestern Bell's actions relating to the MPUC and voted to return no indictments. *See* Minneapolis Star Tribune, Feb. 26, 1987, at 1A, 9A. Thus, petitioners' assertion (Petition at 11) that the rates charged by Northwestern Bell pursuant to MPUC order in Docket 83-600 have "already been recognized to have been tainted by Respondent's acts of bribery" is simply false. None of the several courts and agencies that have looked into the matter has ever characterized Northwestern Bell's conduct in this regard as criminal. Indeed the MPUC itself found no evidence even of procedural impropriety with respect to most of the proceedings apparently embraced by petitioners' RICO claim.

two orders were affirmed in December 1987 by the Minnesota Court of Appeals. *Matter of Minnesota Public Utilities Comm'n*, 417 N.W.2d 274 (Minn. App. 1987), *cert. denied*, 488 U.S. 849 (1988).

Finally, in response to a request from the MPUC in its April 3, 1987 Order, the State of Minnesota brought an action to compel Northwestern Bell to refund amounts collected by it in accordance with the MPUC's 1984 Order in Docket 83-600 that exceeded the new rates established by the MPUC, upon redeliberation, in 1987. *State of Minnesota v. Northwestern Bell Telephone Co.*, Civil File C8-87-487340 (Ramsey Cty., Minn., Dist. Ct.). That action was settled in September 1989, and refunds totalling approximately $32 million (plus interest) have been made.

C. Factual Allegations

Because this action was disposed of on the pleadings in the district court, there is no factual record. The allegations of petitioners' amended complaint, which are adequately summarized at pages 8 through 10 of the Petition, must be assumed, for present purposes, to be true. Northwestern Bell wishes to make it plain, however, that it denies any illegality in its dealings with the MPUC. *See also* note 2, *supra*. It is confident that, if this action were ever brought to trial, petitioners' allegations would be shown to be factually as well as legally groundless.

REASONS FOR DENYING THE WRIT

Petitioners seriously misrepresent the substance and effect of the judgment below. The court of appeals did *not*, as petitioners would have the Court believe, "carve[] out an . . . implied immunity from RICO jurisdiction for Northwestern Bell based on

its status as a regulated utility." Petition at 13. Rather, the decision below holds only that the filed rate doctrine -- a rule of general application that has long been recognized by this Court -- applies to claims asserted under RICO in the same way as it applies to claims asserted under any other legal theory. Thus, the court of appeals did not create a "utility exception" to RICO, but only held that there is no "RICO exception" to the filed rate doctrine. This decision does not conflict with the decision of any other court of appeals and is entirely consistent with relevant decisions of this Court.

I. The Court Of Appeals Correctly Held That Petitioners' Claim For Damages Is Barred By The Filed Rate Doctrine As Articulated By This Court.

Petitioners' amended complaint describes the injury for which they seek to recover in this action as follows:

> The plaintiffs and the class they seek to represent, were damaged in that, by reason of the actions alleged in Count I-V herein, the compensation Northwestern Bell was allowed to receive by the P.U.C. was *in excess of what would be fair and reasonable* charges to plaintiffs and members of the class, and that *said unfair and unreasonable compensation* was caused by the involvement in bribery, attempts to bribe, conspiracy and racketeering activities alleged in this complaint.

Amended Complaint, ¶ 75 (emphasis added).

Petitioners thus seek to recover damages for the alleged violations of RICO measured by the difference between the rates the MPUC approved and the amount a jury finds would have been approved but for the alleged wrongdoing. As the courts below correctly held, this theory of damages runs squarely afoul of the filed rate doctrine, under which federal courts will not entertain

claims premised on the contention that the "reasonable" rate for regulated services is something other than the rate promulgated or approved by the relevant regulatory agency.

This Court has repeatedly applied this principle, regardless of the legal basis for the claim that something other than the filed rate should properly have been charged. *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922) (antitrust); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951) (fraud); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (breach of contract); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) (antitrust); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. ____, 110 S. Ct. 2759 (1990) (breach of contract). As the Court explained in *Keogh, supra*:

> Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. *The rights, as defined by the tariff, cannot be varied or enlarged by* either contract or *tort of the carrier.*

260 U.S. at 163 (emphasis added).

The Court has also made clear that the filed rate doctrine does not, by barring particular types of damage claims, amount to recognition of an immunity for regulated utilities from the laws under which such claims are brought. In *Square D, supra*, the Court rejected the argument that application of the doctrine to an antitrust claim was contrary to cases disfavoring implied immunity from the antitrust laws, saying:

> We disagree . . . with petitioners' view that the issue in *Keogh* and in this case is properly characterized as an "immunity" question. The alleged collective activities of the defendants in both cases were subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief. *Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation. Such a holding is far different from the creation of an antitrust immunity . . . .

476 U.S. at 422. The Court observed that "a critical distinction remains between an absolute immunity from *all* antitrust scrutiny and a far more limited non-availability of the private treble-damages remedy." *Id.*, n.28 (emphasis in original).

Similarly, in the present case, the court of appeals did not recognize a total exemption from RICO for regulated utilities. Its opinion has nothing whatever to do with the extensive criminal and civil remedies available to the Government under the statute. The court did not even hold that utilities are always immune from civil damage liability under RICO. It held *only* that the claim for damages asserted *in this case* may not be maintained because it challenges rates promulgated by the agency having the exclusive power to make intrastate telephone rates in Minnesota.

Far from creating a "public utilities" exception to RICO, the true effect of the decision below is to *refuse* to recognize a "RICO" exception to the long-standing filed rate doctrine, whereby utility customers may not maintain collateral attacks, in any guise,

on the rates enacted by utility regulatory bodies.[3] The decision was plainly correct under the prior filed rate decisions of this Court. As will now be shown, it does not conflict with the decision of any other court of appeals, and is consistent with this Court's RICO decisions.

II. This Case Presents No Conflict Among The Circuits.

Petitioners' primary argument as to why this Court should grant certiorari is the assertion that the Eighth Circuit's decision conflicts with a decision of the Eleventh Circuit, *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), and a decision of the Second Circuit, *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) ("*LILCO*"). This assertion is wrong in both respects.

First, petitioners presumably were unaware of the fact that, a few days before they filed their petition, the Eleventh Circuit vacated the panel opinion in *Taffet* and set the case for rehearing *en banc*. *Taffet v. Southern Co.*, No. 90-7088 (11th Cir. April 10, 1992) (reproduced in the appendix to this brief for the Court's convenience). This order, by vacating the panel opinion relied upon by petitioners, has the effect of reinstating, pending rehearing

---

[3] Petitioners' primary support for their assertion that the courts below created a "utility exception" to RICO is a single sentence from the district court's 1990 opinion, 734 F. Supp. at 888, which they quote at least three times. Petition at 7-8, 13, 17. But the district court's opinion is not under review here. Even if that sentence could be read as recognizing a blanket "utility exception" (which Northwestern Bell submits it cannot), there is absolutely nothing in the Eighth Circuit's opinion to suggest that it shared the district court's view in this regard or endorsed such an "exception." On the contrary, the court of appeals noted that the portion of the district court's opinion in which the sentence appears was "not the basis for the district court's dismissal of the complaint, but simply provided 'additional support' for its ruling that the filed rate doctrine barred [petitioners'] RICO claims." 954 F.2d at 494.

en banc, the two district court decisions under appeal in *Taffet*. Both of those decisions, *Carr v. Southern Co.*, 731 F. Supp. 1067 (S.D. Ga. 1990), and *Taffet v. Southern Co.*, No. 89-V-712-N, 1990 U.S. Dist. LEXIS 4189 (M.D. Ala. Jan. 5, 1990), agree with the Eighth Circuit's holding, in the instant case, that the filed rate doctrine applies to civil RICO claims in the same manner and to the same extent as it applies to claims asserted under any other legal theory.[4]

The Eighth Circuit's decision in the instant case also does not conflict with the Second Circuit's decision in *LILCO*. Petitioners are forced to acknowledge that the *LILCO* court never considered the filed rate doctrine, and are reduced to speculating about how that court would have ruled if confronted with a defense based on that doctrine. Petition at 20. They should likewise admit (although they do not) that *LILCO* involved only questions, having to do with the "clear statement" doctrine and principles of *Burford* abstention, with which the Eighth Circuit was not presented and that it expressly declined to decide. 954 F.2d at 495. In short, this case "conflicts" with *LILCO* only in the legally meaningless sense that a utility defendant prevailed in the former and lost in the latter based on entirely different grounds. This is hardly the kind of "conflict between circuits" contemplated by this Court's Rule 10.1(a), and it is not one that should commend itself to the Court's discretionary jurisdiction.

The present case is the first and, thus far, the only case in which a court of appeals has finally decided the question posed by this petition -- whether the filed rate doctrine applies to RICO

---

[4] Moreover, the Eighth Circuit's decision does not conflict, as petitioners assert, even with the now-vacated panel decision in *Taffet*. The Eighth Circuit obviously was aware of that decision, but distinguished it based on facts unique to this case. 954 F.2d at 491-92.

claims. Respondent respectfully submits that this question is not one of such urgent public importance that this Court should undertake to decide it the first time it is presented. The question may not arise again in the lower courts with any frequency.[5] If it does, and the Court eventually is presented with conflicting decisions from the circuits, its ultimate resolution will benefit from the varying viewpoints that more extensive consideration by the courts of appeals will provide. *Cf. McCray v. New York*, 461 U.S. 961, 963 (1983).

III. This Case Does Not Conflict With This Court's Prior RICO Decisions.

Petitioners also argue that the decision below is contrary to this Court's prior decision in the present case and the Court's other RICO decisions. Again both assertions are wrong.

First, it is absurd to assert that the decision below is contrary to this Court's prior ruling in this case. The Court considered and decided only one technical question of RICO pleading -- whether "multiple schemes" must be alleged and proved in order to establish a "pattern of racketeering activity." It acknowledged that the 1986 district court judgment had also rested on the filed rate doctrine, and explicitly noted that it was not considering that issue. 492 U.S. at 234 n.1.

The Court's prior decision clearly did not, as petitioners suggest, direct that this case go forward without regard to other legal barriers that might exist to petitioners' claims. That decision is wholly irrelevant to the filed rate ground on which the district

---

[5] The actual precedential impact of the Eighth Circuit's decision may be quite limited, given the extent to which the court relied upon specific facts resulting from unusual aspects of Minnesota's regulatory process and the remedies available thereunder. *See* 954 F.2d at 491; *see also* pp. 5-7, *supra*.

and appellate courts relied in their decisions upon remand from this Court.

The decision below also is consistent, rather than inconsistent, with the Court's decisions in other cases. While cases such as *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), have rejected judicial attempts to add to the elements of a violation as defined in the statute, it can hardly be said that the Court has rejected all "attempts to limit" RICO, as petitioners claim. On the contrary, in *United States v. Turkette*, 452 U.S. 576, 583 (1981), the Court held that a RICO "enterprise" must be an "entity separate and apart from the pattern of activity in which it engages," a "limiting" interpretation on which many subsequent RICO claims have foundered. In *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143 (1987), the Court held that civil RICO claims are governed by the four-year statute of limitations applicable to civil antitrust claims rather than the five-year federal "catchall" statute governing criminal RICO claims, the various longer or shorter state statutes that lower courts had theretofore applied, or (as Justice Scalia suggested) no limitations period at all. Again, the result was to "limit" the viability of some RICO claims that would have been permitted if a different result had been reached.

Only this Term, again relying on an analogy to the antitrust laws, the Court held that a RICO plaintiff may recover only for injuries that were proximately caused by the defendant's violation, rejecting the more "liberal" or less "limiting" standard of factual, or "but for," causation. *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 60 U.S.L.W. 4225 (U.S. March 24, 1992). The Court based this conclusion on the fact that the statutory language creating the RICO civil damage remedy, 18 U.S.C. § 1964(c), is drawn directly from section 4 of the Clayton Act, 15

U.S.C. § 15, which has always been interpreted as carrying a proximate-cause requirement within it. As the Court said:

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them. Proximate cause is thus required.

60 U.S.L.W. at 4228 (citations omitted).

This reasoning applies equally to validate the Eighth Circuit's decision in the present case. The filed rate doctrine, like the requirement of proximate cause, is part of the meaning that courts have given to the phrase "injury to business or property" for purposes of the Sherman and Clayton Acts. *Keogh*, *supra*; *Square D*, *supra*. The same words are used in RICO, and they should be read as having the same meaning in both statutes. If paying a rate approved by the competent regulatory agency cannot give rise to a claim of "injury" under the Clayton Act, as *Keogh* and *Square D* hold, no more can "injury" be claimed in the same circumstances under RICO, for the reasons recently stated in *Holmes*.

CONCLUSION

This Court has never held, as petitioners seem to think, that claimants under RICO enjoy some sort of special immunity from legal principles that apply generally to all legal claims, even if those principles may have the effect of "limiting" recovery in a particular case. In the present case, the court of appeals did no more than to apply one such principle that this Court has repeatedly reaffirmed in a variety of contexts -- the filed rate doctrine -- to bar petitioners' RICO claims. In doing so, the court acted consistently with all relevant decisions of this Court and created no conflict with the decision of any other court of appeals.

For all the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

FAEGRE & BENSON
John D. French
(*Counsel of Record*)
John F. Beukema
James L. Volling
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 336-3000

Stephen T. Refsell
Chief Counsel - B.G.S.
US WEST Communications, Inc.
150 South Fifth Street
Suite 3000
Minneapolis, MN 55402
(612) 663-5689

Counsel for Respondent
Northwestern Bell
Telephone Company

May 8, 1992

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-7088

M. R. TAFFETT and ROBERT M. FIERMAN, on behalf of themselves and all of the persons, corporations, municipalities, and other entities, other than the defendants, who are similarly situated,

Plaintiffs-Appellants,

versus

THE SOUTHERN CO., SOUTHERN COMPANY SERVICES, INC., ALABAMA POWER COMPANY and ARTHUR ANDERSEN & CO.,

Defendants-Appellees.

No. 90-8452

FREDERICK RODGERS CARR, CARR SALES COMPANY, O.E.M. PRODUCTS, INC., TIMOTHY DUNN STOKELY, III and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

versus

THE SOUTHERN COMPANY, SOUTHERN COMPANY SERVICES, INC., GEORGIA POWER COMPANY, and ARTHUR ANDERSEN & CO.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama and the Southern District of Alabama

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 6, 1991, 11th Cir., 1991, ___ F.2d ___)

(April 10, 1991)

Before TJOFLAT, Chief Judge, FAY, KRAVITCH, HATCHETT, COX, BIRCH and DUBINA, Circuit Judges.*

BY THE COURT:

A member of this court in active service having requested a poll on the applications for rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above causes shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

---

*Judges R. Lanier Anderson, III and J. L. Edmondson have recused themselves and will not participate.

Senior Judge Frank M. Johnson, Jr., who was a member of the original panel, has elected not to further participate in this matter. See 28 U.S.C. §46(c).